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HINTS
FOR FORENSIC PRACTICE:

A MONOGRAPH

ON CERTAIN RULES APPERTAINING

TO

THE SUBJECT OF JUDICIAL PROOF.

By

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"Reason is the life of the law, nay, the common law itself is nothing else but reason . . . . . The law, which is perfection of reason." COKE, Inst.

"To whomsoever, with other than a professional eye, it can have happened to take up a book on the subject of evidence, be the book what it may, it can scarcely have been long before he saw more or less reason to suspect that, in the formation of the mass of rules of which he found it composed, the share taken by that faculty which, when applied to other subjects, goes by the name of reason must have been small indeed." BENTHAM, Introd. to Rationale of Jud. Evidence.

"Medio tutissimus ibis." OVID, Metam.

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INTRODUCTORY.

"Objected to, as incompetent, irrelevant and immaterial."

This particular objection, to the introduction of evidence, was taken twenty-seven times on the trial of the action reported in 129 N. Y., at page 252; twenty-two times in the case in 149 N. Y., 154; twenty-two times in 173 N. Y., 549; nine times in 128 N. Y., 571; and three times in 179 N. Y., 24. An echo from the Pacific coast is heard in 46 Cal., 397.

In the celebrated action reported in 90 N. Y., 122, the distinguished counsel, who officiated at the trial, totally abstained from the use of this formula, and, in eighteen instances, expressed their opposition, to evidence offered, by the first two words ("objected to") of the foregoing quotation,—a mode of objection which they may have considered equally expressive and effectual.

Its resonant euphony, and an air of erudition, not altogether dissociated from obscurity, which pervades this tripartite specification, probably serve to recommend it to the advocate, who,

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though reasonably sure that he would rather dispense with particular, proposed evidence, is not prepared, on the spur of the moment, accurately to state the reasons why his preference should be gratified.

In one case, counsel proved himself equal to the feat of doubling the galaxy, his rotund protest being, that evidence offered was "incompetent, irrelevant, immaterial, impertinent, inadmissible and improper." He might have added, "illegal, injurious and intolerable."

The opinions of the Courts teem with admonitions, to counsel, of the desirability of being *specific* in their statements of the grounds upon which they oppose the introduction of evidence, on trials, and advising of the serious consequences likely to ensue from a deficiency in that respect.

Is the triple, rhythmical alliteration, to which reference has been made, amenable to criticism, as lacking such requisite quality?

Again, there are decisions of high authority, apparently *holding* that counsel may, under certain circumstances, sit silent at the time when his opponent offers testimony or documents, without precluding himself from subsequently avoiding the effect of the evidence, if admitted and deemed, by him, to be harmful to his case.

In what manner is this privilege, or possibility, to be reconciled with the admonitions mentioned, and with what is believed to be a more or less gen-

eral impression, that the best, if not the only available, time to *start* opposition to the allowance of evidence is when the adverse counsel seeks its admission, if the ground of objection be then apparent?

An effort to discover and explore the legal principles underlying these and allied queries was the occasion of setting down what is submitted to the reader in the following lines.

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Of Certain Elementary Terms.

Negative character of evidence rules.

A feature of the phrase, "incompetent, irrelevant and immaterial," which attracts immediate attention, is the negative quality of each of the three component words, arising from the common presence of the initial, inseparable preposition of privation, a peculiarity which recalls a complaint of Mr. Justice Stephen, that "the great bulk of the law of evidence consists of negative rules declaring what, as the expression runs, is *not* evidence."[1]

The particular subject, in hand, belongs to the practical side of the law of evidence, and its discussion presupposes an apprehension of the nature and methods of what may be termed the Anglican system of adducing forensic proofs, and an appreciation of the true import of certain terms.

[1] Dig. of Law of Ev., introd.

EVIDENCE.—This term, as might be expected, has been copiously and variously defined. "The word evidence" (*evidentia*) "signifies, in its original sense, the state of being evident, *i. e.*, plain, apparent or notorious. But by an almost peculiar inflection of our language, it is applied to that which tends to render evident, or to generate proof." [1]

Best's definition of evidence.

"Evidence is a word of relation . . . . By the term . . . . seems in general to be understood any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact—a persuasion either affirmative or disaffirmative, of its existence." [2] This broad and liberal definition is quoted in Cook *v.* New Durham.[3] The proposition contained in the first clause of the foregoing quotation is emphasized by a recent writer, who says: "Evidence is always a relative term. It signifies a relation between two facts, the *factum probandum*, or proposition to be established, and the *factum probans* or material evidencing the proposition.[4] . . . No correct and sure

Bentham's definition of evidence.

[1] Best on Ev., § 11.

[2] Benth., Rationale of Jud. Evidence, bk. 1, ch. 1.

[3] 64 N. H., 419, 420; 1887.

[4] *Conf.* Bentham: "In every case, therefore, of *circumstantial* evidence, there are always at least two facts to be considered:—1. The *factum probandum*, or say, the principal fact—the fact the existence of which is supposed or proposed to be proved—the fact evidenced to—the fact which is the subject of proof;—2. the *factum*

comprehension of the nature of any evidential question can ever be had unless this double or relative aspect of it is distinctly pictured." [1]

Blackstone's definition of evidence.

Blackstone defined evidence as "that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue, either on one side or the other." [2]

Greenleaf's definition of evidence.

According to a later writer, "the word evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." [3]

This definition has had great vogue. A number of judicial opinions, in which it has been cited or quoted, are mentioned in a recent encyclopedic work.[4]

Federal Court's definition of evidence.

"Evidence, in its narrow and technical sense, is a machine for the discovery of truth, fettered and restrained by municipal law and by local regulations, which vary greatly in different countries." [5]

Wigmore's definition of evidence.

This group of definitions will be concluded by giving the learned and elaborate definition of evidence, laid down by a text-writer already cited: "Any knowable fact

probans—the evidentiary fact—the fact from the existence of which that of the *factum probandum* is inferred" (Rationale of Jud. Ev., bk. 5, ch. 1).

[1] 1 Wigmore on Ev., 5; 1904.

[2] 3 Comm., 367.

[3] Greenl. on Ev., § 1.

[4] Words & Phrases Jud. defined, 2522; 1904.

[5] Hubbell *v.* U. S., 15 Court of Claims, 546, 606, Dissent.; 1879.

or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal, for the purpose of producing a conviction, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked." [1]

Judicial evidence a species.

From the foregoing, it is clear that judicial evidence, with which alone we have now to do, is a *species* of a *genus*. It has been described as natural evidence, restrained or modified by rules of positive law, some of which are exclusionary and others investitive.[2] The same author indicates the character of the latter class of rules, thus: rules "investing natural evidence with an artificial weight, and even in some instances attributing the property of evidence to that which, abstractedly speaking, has no probative force, at all." [3]

Relation of logic to evidence.

The relation of logic to judicial evidence is undoubted and intimate. The Anglican law of evidence may be said to consist of an application of the unalterable principles of logic, with exceptions, from the ordinary results of applying the same, originating in a concern for the social safety or utility, and in considerations of feasibility of judicial administration, many of the latter being distinctively grounded in the regard

[1] Wigmore on Ev., 3; 1904.
[2] Best on Ev., § 34.
[3] *Ibid.*

of the Courts for the consecrated right of trial by jury. The exceptions so established are, undoubtedly, in the main exclusory; wherefore, the chief task of the logician, entering the legal domain, is to appreciate, correlate and memorize the exceptional exclusions.

Stephen's illustration of negative rules.

Mr. Justice Stephen, contemplating these exceptions, exclaimed that he found himself in "the position of a person who, never having seen a cat, is instructed about them in this fashion: 'Lions are not cats, nor are tigers nor leopards, though you might be inclined to think they were.' Show me a cat, to begin with, and I at once understand what is meant by saying that a lion is not a cat, and why it is possible to call him one." [1]

Proposal to identify relevancy and admissibility.

Accordingly, that jurist proposed an affirmative key to the mystery encompassing the nature of judicial evidence, by submitting that—what may be judicially proved includes (only) 1st, all facts in issue, and 2d, all facts relevant to the issue. This would make relevancy to the issue, except in the extreme (1st) case mentioned, the sole criterion, indeed the synonym, of admissibility of evidence.

Criticism of that proposal.

But that proposal has been attacked by an acute writer, who insists that it is only by an arbitrary use of the word, "relevant," that the rules relating to rele-

[1] Dig. of Law of Ev., introd.

vancy can be brought within the same class as rules which determine what classes of fact tend to prove a matter in question; and points out that *hearsay*, being testimony reproducing "statements which, if the persons making them were called as witnesses, would be perfectly relevant," is excluded because those statements "are wanting in the sanction and the tests which would apply to them if they were so made," the rule of exclusion here being a different one, and founded on a different reason, and "the doubt and suspicion which attend them being a doubt and suspicion attaching to their accuracy." [1]

Ultimate basis of Anglican law of evidence.

The ultimate basis of our system of the adduction of judicial evidence, as has often been remarked, is the recognized concatenation of most of the events submitted to human experience and observation. Seldom does a fact stand without environment,—utterly isolated and solitary. The relation of causality, between two facts, is the one of principal significance to the logician and the student of the law of evidence.[2] Aristotle's dictum, *de omni et de nullo*, inevitably controls the processes, because that philosopher's discovery was of a universal law of mental operation; but the principles of a deductive logic are not the sole guide of

[1] Solicit. Jour., vol. 20, p. 906.

[2] "Every chain of causality is a chain of evidence. Every effect is evidentiary of its causes: every cause is evidence—evidentiary—of its effects (Benth., Rationale of Jud. Ev., bk. 5, ch. 1, *n.*).

the judge or the advocate, for the reason, already intimated, that positive, municipal law has superimposed various, mainly exclusory, rules. The books are filled with reminders of the distinction between natural and judicial evidence, as also between logical and legal relevancy, but the observations there encountered are most frequently of a more or less vague and general character.

Illustration of the function, and the limitations, of the syllogism, in forensic proof.

An attempt will be made to illustrate the application of the formal syllogism to forensic proof; which illustration will serve to indicate and emphasize the legal differentiation of the ordinary logical process:

In an action, brought by a depositor in a bank, against the latter, to recover a balance, on account of the principal of his deposit, *with interest thereon*, the issue, raised by the pleadings, turned on the question whether there had been an agreement to pay interest. Plaintiff having produced evidence tending to show such an agreement, defendant introduced evidence tending to show an agreement that no interest was to be paid, whereupon plaintiff, in rebuttal, *offered* evidence that he had received interest on balances, on deposit in the other banks in the same locality; and sought to show an offer, made by one of those banks, to pay a specified rate of interest on all the money which he had, for deposit; also to show what was the prevailing rate of interest usually allowed by the local banks,

on their depositors' balances. *Held*, inadmissible, as "too remote," and tending to raise "collateral issues." [1]

One of the steps in plaintiff's progress toward the desired conclusion, at the trial, which the appellate court condemned, may, it is believed, be exhibited, in its strictly logical aspect, thus:

Major premiss:—What all the local banks, other than defendant, agreed to do, is (probably) what defendant agreed to do.

Minor premiss:—All the local banks, other than defendant, agreed to pay interest.

Conclusion:—Therefore, defendant agreed to pay interest.[2]

Evidence-rules not subversive of logical.

By the ruling of the highest Court, adverse to plaintiff's offer of evidence, the *reasoning* analytically exhibited in the foregoing syllogism, which was an instance of *Barbara*, was, by no means, condemned. All that logic looks to is the legitimacy of the act of inferring the conclusion from the premisses. The invalidity of a conclusion, arising from *fallacies* (violations of the rules governing the *process of inference*), is the same, in all reasoning, legal and

[1] 139 N. Y., 514, 523.

[2] "*Argument.* That which originally vests in the heir, and was not in the ancestor, vests in the heir by purchase.

"But this use originally vested in Richard Shelley, and never was vested in Edward Shelley.

"And therefore the use vested in Richard Shelley by purchase" (Report of argument of counsel, in Shelley's Case, 1 Coke Rep., 94 b; 1579, A. D.).

non-legal. The Conclusion, in the foregoing syllogism, was a valid deduction. But the law—the Court—took exception to the premisses.

Evidence-exceptions subvert the premisses of syllogisms.

First, as to the major premiss. This proposition, to the extent of its validity, was one obtained by induction and generalization, from ordinary experience and observation. It did not appear, in evidence or utterance, but, rather, was subconsciously in the reasoner's mind. While, as the court observed, there might be "what is called moral evidence, of a more or less convincing" character, in its favor, it was rejected as being legally "too remote," *i. e.*, too far removed from the *legal* standard of probability. The degree of probability, in other words, was not sufficiently high for juristic purposes. As soon as it was determined to reject this major proposition, the syllogism was doomed, and the minor premiss became unserviceable, because two premisses are essential to every argument. But

Evidentiary facts are minor premisses.

Second. The minor premiss[1] was excluded for a further, independent reason, viz.: the settled repugnance of the courts to the raising of collateral issues. Had this evidentiary fact been admitted, the court and jury would, thereupon and thereby, have entered upon the trial of as many subordinate issues, as there were local banks concerned in the proposed evidence.

[1] *N. B.* This was the *evidentiary* fact.

The Conclusion of the syllogism was the *fact in issue;* unless it be better to consider it as serving as the major premiss of a syllogism, later in logical order, the conclusion of which would be, that defendant was indebted to plaintiff in a specified sum, as asserted and denied, respectively, in the pleadings (the "issue").

The "Fact in issue" is the logical conclusion of a syllogism.

The reasoning, in forensic contests, as in human thought and action generally, proceeds ordinarily in *enthymemes*—syllogisms wherein one of the premisses is suppressed, and a series of which forms what the logicians term a *sorites*. The mind, in its eager pursuit of the desired, ultimate conclusion, hurries from premiss to conclusion, and from the latter to a new premiss, and thence to a later conclusion, unconscious of the obedience rendered by it,—subject to the possibility of a betrayal into fallacy,—to Aristotle's law. In these legal arguments, specifically juristic rules are continually intervening, to thwart the progress along strict logical lines, by demolishing premisses.

Enthymematical character of conscious ratiocination.

ISSUE.—Blackstone has already been quoted, as referring to the "fact or point in issue," and Mr. Justice Stephen, as proposing to restrict (or extend) all admissions of evidence to (1) facts in issue, and (2) facts relevant to the issue. In pausing, a moment, to consider this legal term, it is proposed to ignore the

Issue (of fact); its relation to pleading.

rambling narratives of chancery, and keep in exclusive view the ultra-refined system of pleading, which grew up in the common-law courts, the general aim whereof was, to ensure "the orderly presentation, upon the record, of the contentions of the respective parties, in relation to the subject-matter of the controversy." [1]

The several common-law pleadings.

This aim was promoted by a series of "pleadings" (only one of which was, possibly, a *plea*), following the issuance and service of the original writ, and commencing with plaintiff's *declaration*, to which defendant might interpose his *plea*, which might be succeeded, in alternation, by the *replication*, *rejoinder*, *rebutter* and *surrebutter*. The net result of this scheme purported to be "to compel the pleaders so to manage their alternative allegations as, at length, to arrive at some specific point or matter affirmed on one side and denied on the other." [3] This point attained, the parties were said to be "at issue"—*ad exitum*.[4]

Issue, the object of pleading. Relevancy to the issue.

The "issue," then, was literally the *exitus*, exit or emergence of the contending parties, from the field of preparatory altercation, and entrance upon the stage of *trial*. The formation of an issue was the end of all common-law pleading. The word, "issue" (referring, now, to issues of fact, as dis-

[1] Steph. on Pl., § 2.
[2] 3 Blacks. Comm., 310.
[3] Steph. on Pl., § 59.
[4] *Ibid.*: 3 Blacks. Comm., 314.

tinguished from those of law) came to denote *the fact*, in regard to which the parties, through the sifting process of the pleadings, at length reached the respective attitudes of affirmation and denial. This circumstance may explain the language of Mr. Justice Stephen, where he speaks of "facts relevant to the issue," and, in the next sentence, of a fact "relevant to another fact." [1]

The "issue", reached by pleading, is a conclusion.

It will be remembered, here, that a "fact in issue" is a conclusion; to prove which conclusion is the function of evidentiary facts. See Tuttle *v.* Hannegan,[2] and Stall *v.* Wilbur,[3] where the Court says, of a complaint, that "the pernicious practice was followed, of setting forth evidence, instead of facts to be established by evidence": which raises a doubt as to the propriety of Stephen's proposed rule, making the "fact in issue" admissible in evidence.

No issue as to evidentiary facts.

"An issue is never raised as to an evidential fact; the only issues the law knows are those which affirm or deny conclusions from one or more evidential facts." [4]

Objections to evidence; kinds.

OBJECTION.—What is an objection to evidence? To define an objection is a matter of no difficulty, it being the formal, oral statement made by counsel, at trial, of his opposition to the introduction of a document offered, or the allowance of an answer, by a witness,

[1] Dig. of Law of Ev., introd.
[2] 54 N. Y., on p. 687.
[3] 77 id., on p. 162.
[4] Wharton on Ev., 3d ed., § 26.

to a question put, by his opponent. Objections have been divided into general and specific.

General objection.

A general objection is where counsel, when evidence is offered, or called for, says: "I object," [1] either without more, or with additions which the law condemns for a lack of precision, and which, therefore, fail to prevent the objection from being relegated to the "general" class.

Specific objection.

A specific objection is one in taking which counsel indicates, with satisfactory definiteness, one or more grounds of his opposition to the introduction of the proposed evidence.

General objection usually unadvisable.

It may be safely stated, that a general objection is apt to be harmful to the objector. "A prudent practitioner will hardly risk any point on a general objection." [2] Moreover, where counsel volunteers a general objection, he may always be compelled to make the objection specific, at the demand of his opponent, or by the Court on its own motion.

Certain of the settled principles, believed to govern objections to evidence, may be noted here:

Two purposes of requiring specificness.

The purpose of requiring an objection to be specific is (1) to aid the trial judge, and (2) inform the opposing counsel.

"It is of importance, that the points intended to be taken on appeal should

[1] See 113 Ind., 200.

[2] Rush *v.* French, 1 Ariz., 99, 125.

be taken on the trial. It is important that the judge should know what he is called upon to decide, and what is the theory of the objector. It is important, also, that the other side understand the objection and its point."[1]

Notice to judge and counsel.

"If a party calls upon the trial court to make a ruling in his favor, he must specify, with reasonable clearness, the point that he desires considered and decided, in order to predicate error upon an exception to the ruling against him."[2]

Foundation for allegation of error.

"The object of the rule requiring objections to evidence to be made specific, and to point out the precise defect existing therein, is to prevent surprise, and enable the party offering it to obviate such difficulties as are merely formal, and can be cured by reforming the question, or which by further proof can be removed, and the question rendered competent."[3]

Prevention of surprise.

"It is an ancient and sound rule, that, when the objection is to the mode of proving a fact, and not to proof of the fact itself, it must be distinctly placed upon that ground, so that the opposite party may obviate the objection by proving the fact in a legal manner."[4]

Objection to *mode* of proof.

[1] McKeon *v.* See, 51 N. Y., 300, 305.

[2] Sterrett *v.* Third Nat. Bank, 122 N. Y., 659, 662; Stouter *v.* Man. R'y Co., 127 id., 661, 664.

[3] Holcombe *v.* Munson, 1 Silv. Ct. of App., 228, 233.

[4] Porter *v.* Valentine, 18 Misc., 213, 215.

"There is reason for requiring the particular objections to be stated with reasonable certainty, for, in the hurry of a trial, it cannot be expected that particular objections will occur to the judge, although, if stated, he would readily perceive their force. Counsel, who are presumed to have studied the case, ought to be able to state the particular objections, and, if none are stated, it is fair to assume that none exist, since an objection that cannot be particularly stated is not worth the making." [1]

Objection, as aid to Court.

Four distinct cases may be presented, on a trial, viz.: where a general objection is (a) sustained, or (b) overruled; and where a specific objection is (c) sustained, or (d) overruled. The judicial rules believed to prevail in these several cases, will be successively enumerated. The first three of those rules are taken from one Opinion,[2] and given in the Court's own language. Though all the remarks of the court, quoted from that Opinion, were not called for by the questions before it, the rules therein stated, may, in view of numerous judicial citations, be considered authoritative. In commenting on the four rules, in succession, the party, proposing the evidence objected to, will, for brevity, be styled the interrogator.

Four separate plights of objections.

[1] Ohio, etc., R. Co. *v.* Walker, 113 Ind., 196, 200.

[2] 70 N. Y., 34.

General objection sustained. Effect.

(a) *General objection sustained.*—"Where evidence is excluded upon a mere general objection, the ruling will be upheld, if any ground in fact existed for the exclusion." [1]

First rule considered.

Comment.—Here, the interrogator appeals. An appellant having the burden of showing error in a ruling of which he complains,[2] it is obvious that, under this rule, the interrogator, in order to secure a reversal of the exclusion, must be able successfully to challenge his opponent to point out a single one of all the exclusionary rules, relating either to the form or to the substance of evidence, which justified the trial court's action. Failing in this, the interrogator will be *held* to have waived precision in his opponent's objection, and to have understood the ruling to be based on the ground or grounds of exclusion declared valid, on the appeal. The words, "in fact," in the language of the court, should not be understood as implying any contrast to the law, they being, doubtless, in the nature of an unnecessary intensive.

General objection overruled. Effect.

(b) *General objection overruled.*—"Where there is a general objection to evidence, and it is overruled, and the evidence is received, the ruling will not be *held* erroneous, unless there be some ground which could not have been obviated if it had been specified, or un-

[1] Tooley *v.* Bacon, 70 N. Y., 34. [2] Mead v. Bunn, 32 N. Y., 279.

less the evidence in its essential nature be incompetent." [1]

Second rule considered.

Comment.—Here, the objector appeals. It may conduce to clearness, in remarking upon this rule, to throw it into a form more nearly resembling that of the preceding one, thus: Where evidence is received over a mere general objection, the ruling will be upheld, *if* the interrogator could have obviated a specific objection, in case such had been made; which, *presumably*, he could not have done if the evidence was so objectionable as to merit the description of being "in its essential nature incompetent." It is impossible to discuss, fully, the relations of this hypothesis to this presumption, before settling the meaning of "incompetent," a point not yet reached, in the study. The best that can be done, at present, is to submit the following description of the situation of the parties in the appellate court: The objector is attempting to secure a reversal of the admission of evidence, and has the *onus* of showing that error was committed below. He may say, either: 1st, "True, I only objected generally, but that was sufficient, because the evidence was in its essential nature incompetent—meaning absolutely and incurably inadmissible—and such evidence should have been excluded upon a mere stop-word;" or, 2d, "I do not contend that the evidence was in its essential nature incompetent, but there

[1] Tooley *v.* Bacon, *ubi supra.*

were one or more less radical grounds for its exclusion, and, if I had specified such ground or grounds, on the trial, my opponent could not have obviated the difficulty. Hence, error."

Specific objection sustained. Effect.

(c) *Specific objection sustained.*—Where evidence is excluded upon an objection, the grounds whereof are specified, "the ruling must be sustained upon that ground, unless the evidence excluded was in no aspect of the case competent, or could not be made so." [1]

Third rule considered.

Comment.—Here, the interrogator appeals. The objector has succeeded, below, in shutting out evidence, on a particular specification of the ground of its asserted inadmissibility. The essence of the rule is contained in the words, "upon that ground," occurring therein. That is, the task of appellant is, in general, merely to subvert that ground of exclusion. Maybe, the trial court ought to have shut out the evidence, but if not *on that ground*, he will secure a reversal of the exclusion. It remains to consider the two exceptions. If, in the words of the court, 1st, "the evidence excluded was in no aspect of the case competent," *or*, 2d, "could not be made so," the exclusion will be sustained, *i. e.*, appellant will fail, though the objector specified amiss. Manifestly, the appealing interrogator has the *onus*, not only of subverting his opponent's specification, but also of negativing the two exceptions. That is to say, after showing

[1] Tooley *v.* Bacon, *ubi supra.*

that the ground, upon which the evidence was excluded, is not tenable, he must go further, and show that he is not concluded by the residue of the rule. That residue containing the word "competent," it is, here also, true that it is impossible to discuss the rule fully, at present. The following observations, however, may be made: The word, "or," connecting what have been above designated the two exceptions, should, almost certainly, be read "and," because the appellant has to meet both. Thus reconstructed, the latter portion of the rule imposes on the appellant the task of showing it to be untrue that the evidence which he offered "was in no aspect of the case competent;" or else, assuming that the evidence was of that character, of showing that he could have made it competent, if his opponent had apprised him of the defect by a different, and correct, specification.

A difficulty stated.

At this point, it must be confessed, a region of obscurity is entered, because of a doubt as to the meaning of "in no aspect of the case competent." Is evidence, so characterized, identical with evidence "in its essential nature incompetent"? Apparently not, for it is inconceivable that evidence of the latter description should "be made" competent. Hence, probably, the meaning of the former phrase is, "for no purpose admissible, when offered." Such an interpretation leaves room for an operation of the hypothesis, that the evidence is capable of being

made competent. Upon this assumption, a situation contemplated by the latter portion of this rule might occur as follows:

Illustration of case under third rule.

A party attempting to discredit his adversary's witness by proving contradictory statements made, by the latter, out of court, without first laying a foundation by interrogating the witness sought to be discredited, concerning such statements, is met by an objection to the proposed evidence, as *hearsay*. The evidence is excluded. Ordinarily, the interrogator, on appeal, should secure a reversal of the exclusion; for, if the objector had made the right specification, the interrogator could have recalled the witness sought to be discredited, for cross-, or further cross-examination. But, suppose that witness departs this life between his examination and the attempt to impeach him. In such case, the interrogator could not lay such foundation—could not make the impeaching evidence admissible—and the appellant must fail, *i. e.*, the ruling of the trial court will be sustained. This illustration is offered for what it may be worth.

Evidence "in its essential nature incompetent" compared with that "in no aspect of the case competent."

If evidence "in its essential nature incompetent" be excluded, on a trial, under objection, an erroneous specification of ground, by the objector, ought on principle to be as free from peril to him as a mere general objection, which, as has been seen, would be sufficient.

(d) *Specific objection overruled.*—Where a specific objection is overruled, and the evidence is received, the rule appears to be, that the objector must stand on his specification, and will not secure a reversal of the admission of the evidence, on appeal, if he assigned amiss.[1]

Specific objection overruled. Effect.

Comment.—Here, the objector appeals. This rule, if correctly stated, appears to be a mere branch of the rule, that a party cannot take an objection in an appellate court, which he did not take below. "It is a general rule, that a question will not be considered, that is raised for the first time in this court." [2]

Fourth rule considered.

In Ward *v.* Kilpatrick, *infra*, which was an action to foreclose a mechanic's lien, an expert witness was called, for plaintiff, and asked, on his direct examination, whether certain frames, as set in the house, made a part of the latter, and whether the house would be finished without them. To which, defendant objected "as immaterial, and that the mechanic's lien-law does not authorize any lien upon mirror-frames or hat-stands." Objection overruled, and evidence received. On defendant's appeal, he urged that "the evidence of a custom or usage" had "been objected to," and was "clearly inadmissible. . . . The evidence was incom-

Case supposed to justify enunciation of fourth rule.

[1] See Ward *v.* Kilpatrick, 85 N. Y., 413.

[2] Dodge *v.* Cornelius, 168 N. Y., p. 245; see, also, 39 Miss., 385.

petent, and should have been excluded." The Court of Appeals refused to sustain defendant's exception, saying:

"A witness, who was a cabinet-maker, and had done that kind of work in the construction of houses, was asked if these frames, as set in the house, made a part of the house, and if the house would be completely finished without them. The objection made was, not that the opinion of the witness upon the point was incompetent, but merely that the evidence was immaterial, which conceded its competency, and that the act of 1875 did not authorize a lien upon mirror-frames or hat-stands. The objections taken furnished no valid reason for rejecting the evidence, and it is unnecessary to debate the one now urged, which was not even suggested upon the trial." [1]

Supposed exception to fourth rule.

It may be proper to infer that, if the evidence objected to, in the case cited, had been "in its essential nature incompetent," the highest Court would have reversed the admission of the evidence. In other words, it is suggested that the fourth rule is subject to an exception, as follows: Where evidence totally and incurably inadmissible is received over objection, a specific but untenable ground for which is stated, the error in the specification will not be fatal to the objector; the admission will be reversed.

[1] 85 N. Y., 416.

Meanings of "incompetent," "irrelevant," "immaterial."

The next branch of this study will be to inquire into the meanings of the three words, above quoted as frequently used in describing the ground of objection to evidence, (1) as indicated by etymology, (2) as given in the law-glossaries, (3) as stated in text-books, and (4) as announced in, or inferable from, Opinions of the Courts.

(1) Etymological Indications.

"Incompetent." Meaning from Etymology.

Incompetent.—"Competent" is the present participle of the verb "compete," used, however, in its neuter and now obsolete sense, of "to fall together;" the latter portion of the word being derived from the latin verb *peto*, having the same root as the aorist of the greek πίπτω. Whence, "competent" signifies—falling together, coinciding, fitting, admissible.[1]

"Irrelevant." *Id.*

Irrelevant.—"Relevant" is from the verb *relevare*, to lift again, and so to relieve, help, assist: whence "relevant," by successive shades of meaning, comes to signify—to the purpose, germane (to a controversy), applicable.[2]

"Immaterial." *Id.*

Immaterial.—"Material" is derived from the latin *materia*, matter; and the grades of meaning are—(1) not spiritual, (2) pertaining to the matter, not to the form, of a proposition, (3) having such relation (to a controversy)

[1] See Murray's New Eng. Dict. [2] See Century Dict.

that it ought to influence the determination, (4) significant.[1]

Results of etymology.

From this, it appears that etymology furnishes the following equivalents: Incompetent = inadmissible; irrelevant = inapplicable; immaterial = insignificant.

(2) Lexicographic Suggestions.

Anderson. Definitions.

Anderson: COMPETENT—proper or admissible, as evidence. RELEVANT—as applied to testimony, that which directly touches upon the issue made by the pleadings, so as to "assist" in getting at the truth of it. MATERIAL—of the substance, essential, important.

Abbott. *Id.*

Abbott: INCOMPETENT—as applied to evidence: not proper to be received; inadmissible, as distinguished from that which the court should admit. IRRELEVANT—not material to an issue. MATERIAL—important; as applied to evidence, much the same as relevant. Matters are pronounced material or immaterial to an issue, with the meaning that they are relevant or irrelevant.

Cyclopedic. *Id.*

Cyclopedic: COMPETENCY—in the law of evidence, that quality of evidence which renders it proper to be given on the trial of a cause, if it be relevant to the issues. INCOMPETENCY—of evidence: not proper to be received.

[1] See Century Dict.

RELEVANT—in the law of evidence: having relation; applicable; applicable to the issue. IRRELEVANT—that which does not support the issue, and which, of course, must be excluded. MATERIAL—that which is essential or important. IMMATERIAL—Not material; not essential or important.

Bouvier. *Id.*

Bouvier: COMPETENT—evidence: that which the very nature of the thing to be proven requires. RELEVANCY—applicability to the issue; that quality of evidence which renders it properly applicable in determining the truth and falsity of the matters in issue. MATERIALITY—capability of properly influencing the result of the trial.

Burrill. *Id.*

Burrill: COMPETENCY—capability; admissibility. RELEVANT—in the law of evidence: having relation; applicable; applicable to the issue. IMMATERIAL—not material; not essential or important.

Summary of foregoing definitions, etc.

It cannot be denied, that whatever light has been thrown upon the three words, "incompetent," "irrelevant" and "immaterial," by the inquiry into their derivations, and consultation of the law-dictionaries, leaves a decided impression that they differ but little from one another, in meaning, and, which is of special moment, that the idea running through all three is not much more definite than a characterization of evidence, offered, as unsuitable, improper, inadmissible.

Were such impression correct and indubitable, the result would be, to relegate an objection, involving the use of one or more of the three words, by way of an attempt at specification of ground, to the class of general objections, with the several dangers, and contingent immunities, to the respective parties, of which a view has been obtained in the foregoing mention of certain rules of practice.

"Immaterial," not essentially a word of relation.

It will be noticed that one of the law-lexicons, cited, expressly asserts the substantial equivalence, in legal content, of immateriality and irrelevancy; but a close scrutiny may be deemed to disclose at least a linguistic difference between "immaterial," on the one hand, and each of the two remaining words, on the other,—in this, that "immaterial" appears to be less clearly a word of *relation*. That which coincides with (*i. e.*, is competent), and that which assists (*i. e.*, is relevant), call insistently for the coincident object, and for that to which the assistance is rendered, respectively; whereas "immaterial" may be regarded as a simple assertion of non-significance or vacuity. In such expressions, however, as "material to," which occur in legal phraseology, a notion of relativity crops out, even in this adjective; and so, it may be, an ambiguity arises, which may explain divergences in the expressions contained in judicial Opinions.

Definitions in treatises and court Opinions.

It is next in order, to attempt to ascertain whether the suggested impressions of similarity, and of a common generality, in the three words, is confirmed or modified by intimations contained in the legal treatises, and in the judicial opinions upon which the former are founded. It is possible that the judicial expressions and decisions will exhibit a tendency to fix a technical import on one or another of the words, irrespective of etymological considerations, and even inconsistent with the pronouncements of the lexicographers; authoritatively establishing differences among them, and according a specific quality to one or more of the trio.

Availability of judicial deliverances.

In view of the nature of judicial decisions, the opinions of the courts will not be expected to prove a field fruitful in formal definitions of words. Rather, will information, as to the verbal meanings, be obtained by inference from adjudications upon the quality and sufficiency of objections taken by advocates in particular cases. In other words, the search, in the Reports of decided cases, is most likely to result in learning whether an actual objection, taken in a particular cause, and involving the use of one or more of the three words, was *held* to be general, or specific, as distinguished from discovering a procrustean definition of any one.

(3) Text-writers' Definitions:

Stephen, on relevancy.

Stephen, who proposed to identify relevancy, and admissibility, suggested the following definition of "relevant": "A fact is relevant to another fact, when the existence of one can be shown to be the cause, or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable or improbable, according to the common course of events." [1]

This definition considered.

The assertion may be ventured, that the average trial-advocate would not, invariably or readily, entwine his apprehension about the ramifications of this definition, when called upon instantly to decide whether or not to trust to the word "irrelevant," as a specification of the ground of an objection; nor would he need to, if relevancy and admissibility were synonymous, for, in such event, "irrelevant" would clearly cease to possess a specific import. The definition of "relevant," above-quoted, has been asserted to have been taken from an earlier Indian pamphlet, and to have been abandoned by the writer to whom it is generally attributed.

Wharton, on relevancy.

According to Wharton, "relevancy is that which conduces to the proof of a pertinent hypothesis;" the hypothesis, referred to, be-

[1] Dig. of Law of Ev., introd.

ing one which, "if sustained, would logically influence the issue. . . . Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable." [1]

Jones, on relevancy.

"In view of the complexity of human affairs, and the infinite variety which questions of fact assume in courts of justice, it is obvious that no definition of the term, relevancy, can be very satisfactory, or afford any very practical aid." [2]

Chamberlayne, on relevancy.

The relation, expressed by the words "logically probative tendency," which one fact sustains to another, is termed relevancy. "Of this, the law furnishes no test." [3]

Reynolds, on relevancy.

"The only practical rules that can be formulated, as to the relevancy of those facts from the existence of which a fact in issue may be probably inferred, are mere enumerations, on the one hand, of certain classes of facts which have been ascertained by experience to be capable of supporting an inference, as to other facts, sufficiently probable to be the foundation of a legal judgment, and, on the other hand, of certain other classes of facts from which no inference could be drawn carrying with it such a high degree of probability as would justify any court in making it the basis of its decision." [4]

[1] Ev., 3d. ed., §§ 20, 21.

[2] Jones on Ev., § 136.

[3] Taylor on Ev., Chamberlayne's Notes, 2.

[4] Reynolds on Ev., § 6.

Bradner, on relevancy.

"As to relevancy, there is a distinction between logical relevancy and legal relevancy. . . . . There is a point, on the question of relevancy, where it depends entirely upon the discretion of the judge, namely, in cases where the question is a close one as to whether certain facts are too remote, although connected with the fact in issue. Upon such questions, no exact rule can be formulated." [1]

Greenleaf, on competency.

The writers of treatises seem generally, on examination, not to have deemed it feasible, or worth the while, to propound formal definitions of *competency* of evidence. Greenleaf appears to be exceptional, in this respect; he stating that, "by competent evidence is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case." [2] This might perhaps be considered as good a definition of evidence, as it is of competency. It is re-stated, *verbatim*, by a later author.[3]

Paucity of textual definitions of "material."

No formal definition of "material," as applied to evidence, has been encountered in any of the text-books which have been consulted. Its near relative, "relevant," on the other hand, is almost universally defined, and frequently discussed at length, in those works.

[1] Bradner on Ev., introd., ix.
[2] Ev., 16th ed., § 2.
[3] Bradner on Ev., § 13.

(4) Judicial Definitions:

Ambiguity of term, "relevancy."

In 1858, the English Court of Exchequer, discussing a litigated point, remarked: "Ambiguity has arisen from the word, relevancy, being used in different senses, whereas, if it always had the same meaning, the obscurity which surrounds this question would be removed." [1]

Judicial definition of "relevancy."

In Platner *v.* Platner,[2] the Court of Appeals said: "The meaning of the word, relevant, as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. It comes from the French *reliever*" (*sic.*), "which means to assist. Whatever testimony was offered, which would assist in knowing which party spoke the truth of the issue, was relevant; and when to admit it did not override other formal rules of evidence, it ought to have been taken. . . . Was the testimony irrelevant? By which is meant, in this case, that the connection between the fact which it proves and the fact in issue is too remote and conjectural."

In Cole *v.* Boardman,[3] it was said:

Id.

"Legal relevancy includes logical relevancy, and requires a higher standard of evidentiary force. A fact logically relevant may be rejected if,

[1] Adams *v.* Lloyd, 3 H. & N., 351, 361.

[2] 78 N. Y., 90.

[3] 63 N. H., 580.

in the opinion of the judge and under the circumstances of the case, it be considered essentially misleading or too remote."

In Levy *v.* Campbell,[1] it was said:

"Relevancy, as that term is used by writers, on the law of evidence, omitting metaphysical distinctions, is that which conduces to prove a pertinent theory in a case, or one which influences or controls the case."

Id.

In Atkins *v.* Elwell,[2] it was said:

"Although, in strictness, the epithet of *incompetent*, applied . . . . to a paper . . . . may indicate that . . . . it was objectionable in its form or mode of authentication, rather than for what it contained, yet the common and different use of the phrase has worn off the sharpness of this meaning."

Id. of "incompetency."

Greenleaf's definition of "competent evidence" is quoted, *verbatim*, in Porter *v.* Valentine,[3] Shea *v.* Mabry,[4] and Horbach *v.* State.[5]

Judicial definitions of "competent."

In Ryan *v.* Town of Bristol,[6] it was said:

"The real grievance of which the defendant complains is, that there was no competent evidence before the jury upon the question of contributory negligence, and that the court ought to have so told the jury and in effect directed a ver-

Id.

[1] 20 S. W. (Tex.), 196.
[2] 45 N. Y., 753.
[3] 18 Misc., 213.
[4] 1 Lea, 319.
[5] 43 Tex., 242.
[6] 63 Conn., 26.

dict on this point. By competent evidence here we understand the defendant to mean relevant evidence."

In Dedric *v.* Hopson,[1] it was said:

Id. of "incompetency."

"The word, incompetency, is . . . . . used to express the thought that certain evidence cannot be lawfully received, or that a witness cannot lawfully testify. It would be quite properly used to express the idea that a witness could not be required to testify concerning certain facts."

In Porter *v.* Valentine,[2] it was said:

Id. of "material."

"Evidence offered in a cause, or a question propounded, is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case."

In David Bradley Mfg. Co. *v.* Eagle Mfg. Co.,[3] it was said:

Id.

"Materiality means the property of substantial importance or influence, especially as distinguished from formal requirement."

In Pangburn *v.* State,[4] it was said:

Id.

"Materiality, with reference to evidence, does not have the same signification as relevancy."

In Peo. *v.* Manning,[5] it was said:

[1] 62 Iowa, 562.
[2] 18 Misc., 213.
[3] 57 Fed. Rep. 980.
[4] 56 S. W. (Tex.), 72.
[5] 48 Cal., 335.

Difference between "immaterial" and "incompetent."

"There is a wide distinction between immaterial and incompetent evidence. It may be material, and tend to prove the issue, but incompetent for that purpose under the rules of law. On the other hand, it may be competent evidence in a proper case, but immaterial to any issue before the court." The meaning of the second sentence is obscure.

Inferences from textual and judicial definitions.

From the foregoing definitions, gathered from treatises and judicial Opinions, it may be permissible to make the following inferences: "Competent" means admissible, and "incompetent," inadmissible; wherefore, an objection to evidence, as incompetent, is absolutely *general*, *i. e.*, affords no intimation of the ground of the objection to the admission. "Relevant" and "material" agree, in referring to matter of substance, as distinguished from technicalities of form or procedure; in other words, relevant or material evidence is such as possesses an inherent capacity or tendency to aid in establishing or disproving the fact in issue. An objection to evidence, as irrelevant, or as immaterial, would, therefore, seem to be specific. Whether these tentative deductions will prove to be supported by actual adjudications, is next to be ascertained.

SECTION II.

Cases, Adjudicating on Objections.

Order of citation of cases.

The decisions, now to be cited, passing on objections, taken to evidence, which involved the use of one or more of the three words under examination, will be referred to, in an order of succession dependent on the number of those words which were used by the objector, or were discussed by the court; beginning with decisions in which only one of the words was concerned.

Incompetent, etc.

Incompetent, etc.—In an action brought to recover damages for injuries suffered by a passenger, through defendant's negligence in starting a train with a sudden jerk, while plaintiff was alighting from a train, a witness for plaintiff, who had been sitting with the latter in the smoking-car, when a dispute occurred there, about fare, between plaintiff and the conductor, was asked, on his direct examination, to repeat a conversation which occurred after that dispute, and was had between witness and the conductor, in

another car into which witness had gone. To this, defendant objected, as "incompetent, inadmissible, and that anything the conductor said to witness in the car next to the smoking-car was not competent." The objection was overruled, and the testimony received, which was to the effect that the conductor asked witness whether he was going to get off at Clyde (the station at which plaintiff afterwards alighted), and then said: "You want to be ready to get off. I will get even with those fellows." On defendant's appeal, the court reversed the admission of the evidence, observed that the serious question in the case was whether the declaration of the conductor was part of the *res gestæ*, *held*, that it was not, and said:

"The plaintiff insists that that ground of incompetency was not raised at the trial . . . . In this he is clearly mistaken. The objection was taken that the evidence was *incompetent*, and that raised then, and presents here, every ground of incompetency which could not have been obviated at the trial, had special attention been called to it. The fact that they" (the declarations) "were not a part of the *res gestæ*, if that be true, was a reason why they should be held to be incompetent, and when one makes an objection which is based upon a right ground, the fact that he does not give every reason why his objection is well taken is of no importance, provided that the ground for the incompetency could not have been obviated, and there-

fore it was not necessary that the reason why the incompetency existed should have been more particularly stated, if, indeed, we can assume that that was not done, which, I think, cannot be fairly assumed from the record." [1]

Remark.—This decision, it is submitted, was an application of rule "(b)." The admission of the evidence, by the trial court, was erroneous because a declaration, not a part of the *res gestæ*, was, in its essential nature, incompetent. "Incompetent" was, therefore, in reality, treated as a general objection. But the closing words of the passage quoted from the Opinion probably render the reference to the principle embodied in rule "(b)" *obiter*, indicating, as they do, that the objector's allusion to "the car next to the smoking-car" gave his objection a specific character, and that the specification was accurate, as pointing to the applicability of the rule of *res gestæ*. "Inadmissible" evidently went for nothing, as an attempt at specification.

Immaterial.—In an action on an accident pol-
Immaterial. icy, it appeared that, in an application-blank, which had been filled out by defendant's agent, a response, purporting to have been made by plaintiff, to one of the printed questions, was to the effect that the latter was, at the time, in the service of one W. The defendant, in its Answer

[1] Taylor *v.* N. Y. C., etc., R. R. Co., 63 App. Div., 586, 588.

to the Complaint, alleged that this statement was untrue; which, if substantiated by evidence, would have been a defence. On the trial, plaintiff was permitted to testify, over defendant's objection that the evidence was "immaterial," that he, plaintiff, did not so state, to the agent who filled out the blank. On defendant's appeal, the Supreme Court, at General Term, sustained the admission of the evidence, saying:

"It was competent to prove by parol the actual transaction between the insured and defendant's agent. The question was perhaps objectionable in form, but the defendant's objection went to the materiality of the evidence sought to be elicited, and it is now too late for him to insist that the question and answer were incompetent without further explanation by the plaintiff." [1]

Remark.—This decision clearly intimates that "immaterial" relates to substance, as distinguished from form, and applies the rule, that one who objects to a fact being proved at all, and is overruled, cannot, on appeal, urge a defect in the mode of proof. It may perhaps be improper to attempt to draw any certain inference, as to whether the appellate court considered the objection which was taken general or specific; unless it be a correct statement of doctrine, to say that an objection going to the substance of evidence is always deemed specific. In such event, the decision was an ap-

[1] Wilder *v.* Accident Assoc'n, 14 State Rep., 365, 367.

plication of rule "(d);" objector specified amiss, on the trial, and hence was remediless, on the appeal.

Immaterial.—In an action for negligence, the plaintiff was allowed to testify, over defendant's objection to the evidence as "immaterial," why he was not positive who accompanied him on his return home, after the accident. On defendant's appeal, the N. Y. Common Pleas, at General Term, sustained the admission of the evidence, saying:

Immaterial.

"The objection was to the materiality of the evidence, but it appears that the testimony was elicited to explain plaintiff's statement, on cross-examination, that he could not identify the person accompanying him home, and, in that connection, it cannot be said to have been immaterial, and the objection to its materiality conceded the competency of the evidence." [1]

Remark.—It is supposed that this decision may be paraphrased thus:—The evidence in question had a bearing on the issue, and defendant's contention to the contrary was properly overruled. No inference, as to the general, or the specific, character of the objection appears to be deducible. The final clause of the quotation from the Opinion seems to be equivalent to saying, that, when one objects to evidence solely on the ground that it

[1] James *v.* Ford, 30 State Rep., 667, 670.

is foreign to the case, he admits that there is no other objection to its admission.

Immaterial.—In an action brought against the sureties on the bond of an INSURANCE agent, to recover a balance of the amount of a DEFALCATION, defendants' Answer to the Complaint contained no effectual denial, but set up, as a defence, certain events, to be mentioned, which were alleged to have occurred *before* any default on the part of the agent. On the trial, defendants offered to prove that, *after* a part of the agent's misappropriation of funds had occurred, they had notified plaintiff of their desire to withdraw from the bond, and that plaintiff, in order to induce them to remain, had promised to take certain precautions, such as requiring the agent to account monthly, etc., which promise had not been kept; whereby the balance of indebtedness, for which the action was brought, had accrued. Plaintiff's objection to this evidence, as "immaterial," was sustained, and the evidence excluded. On defendants' appeal, the court reversed the exclusion, saying:

Immaterial.

"The offer involved a defence for the sureties, to some extent, and in some amount, unless certain technical criticisms justify its rejection. It is said, no such defence was pleaded. It was pleaded as occurring *before* any default, and if such objection had been made, an amendment of the Answer might justly have been allowed, asserting that it occurred

also after default. . . . If the offer was very general, the objection to it was of the same character, merely that it was immaterial, and as we can see in it the elements of a possible defence, we think it ought not to be construed too rigidly for the purpose of justifying its rejection." [1]

Remark.—Here, "immaterial" is expressly stated to be a general objection; and, on that basis, as the evidence was excluded on the trial, the decision would fall under rule "(a)." And it might have been expected that the trial court would have been sustained, since a ground, pointed out by the appellate court, existed for the exclusion, namely: the proposed evidence was not within the pleadings. But the ruling below was not upheld, because the application of the principle embodied in rule "(a)" was considered, under the particular circumstances, to be too technical. The following view of the gist of this decision may be permissible: Notwithstanding the judicial remark, that the objection was general, the case really turned on the distinction, between objections to form and objections to substance. Plaintiff's objection, that the evidence offered had no bearing on the issue, though correct as the Answer to the Complaint stood, would not have been good, if the trial court had allowed an amendment of the Answer; and this the Court might have done, if the objection had been explicitly taken, that the evidence offered was not in support of the allegations of that pleading.

[1] Emery *v.* Baltz, 94 N. Y., 408, 414.

Incompetent and immaterial.

Incompetent and immaterial.—On the trial of an action brought to recover a balance alleged to be due on a contract for building a house, it becoming apparent that plaintiffs would be unable to prove full performance of the contract, they were permitted, over defendant's objection that the same was "immaterial and incompetent," to give evidence tending to show a substantial performance, and a waiver as to what was left undone. At the close of the evidence, the trial court, on plaintiffs' motion, permitted the pleadings to be conformed to the proof; which permission defendant, on his appeal, alleged as error, contending that such a motion cannot be granted where objection to the admission of evidence is promptly taken on the ground that it does not tend to support the allegations of the pleading. But the trial court was sustained, on the appeal, the court saying:

"This is the rule correctly stated; but it does not assist the defendant for the reason that no objection was made by him, that the evidence was inadmissible upon the ground that it did not tend to support the allegations of the pleadings. There is no case that holds that the pleadings may not be conformed to the proof where the sole objection to the evidence is, that it is incompetent and immaterial. . . . The objection interposed, as 'incompetent and immaterial,' is insufficient to raise the question." [1]

[1] Charlton *v.* Rose, 24 App. Div., 485, 487.

Remark.—Intimation, that "incompetent and immaterial" is a general objection.

Incompetent and immaterial.

Incompetent and immaterial.—"There are several exceptions to testimony, urged on behalf of the appellant. The difficulty with these criticisms lies in the fact that the objections urged were not sufficiently specific. To illustrate: In one instance, a witness on behalf of the plaintiff was inquired of, concerning an offer which purported to be made by the ——— company, evidently in writing. The objections tendered were that the proffered testimony was incompetent and immaterial. It was both competent and material. Had the objections stated that the instructions were in writing, and that the question involved a conclusion, they would have been available, and the trial judge would then have sustained the objections, and the vice in the question could have been eradicated." [1]

Remark.—Intimation, that "incompetent and immaterial" is a general objection. Application of rule "(b)."

Incompetent and immaterial.

Incompetent and immaterial.—A *copy* of a "protest," made by the master of a vessel, was received in evidence, over an objection that it was "immaterial and incompetent." The witness who produced the paper testi-

[1] Asbestos Pulp Co. *v.* Gardner, 39 App. Div., 654.

fied that he had searched for the original, and could not find it, and that the copy was correct. On appeal, the court sustained the admission, saying:

"The first objection made by the plaintiffs was 'to the reading of the protest, as incompetent and immaterial.' It is now sought to sustain this objection on the ground that the paper read was a copy and not the original. Such does not appear to have been the explicit objection at the circuit. We think that idea was not conveyed to the mind of the court. . . . To make the alleged defect in the paper itself available on review, the attention of the court and of the opponents should have been drawn with more exactness to the specific ground of objection now taken. Had this point, that this was but a copy, been plainly presented, it might have been, if indeed it was not, avoided by preliminary proof of loss or destruction of the original. By the objection, that the reading of the protest was incompetent, was, doubtless, understood that, though, as a general rule, the declarations of a party made out of court may be proven against him, still a 'protest' was not such a declaration as came within that rule. But it was a proper mode of showing a declaration of the plaintiffs. . . . It spoke of matters material to the pending issue, and it furnished a proper mode of establishing those matters against the plaintiffs." [1]

[1] Atkins *v.* Elwell, 45 N. Y., 753, 756.

Remark.—It is to be inferred, that "incompetent and immaterial" is a general objection. The case seems to be an application of rule "(b)." The evidence was not in its essential nature incompetent; and the objection, urged on the appeal,—that the paper was not the *best* evidence,—might perhaps have been obviated if it had been taken at the trial. Finally, there is ground for considering the entire ruling, as to evidence, *obiter*.

Incompetent and immaterial.

Incompetent and immaterial.—In an action upon contract, plaintiff offered evidence tending directly to contradict testimony which H., a witness for defendant, had given, "upon the vital issue in the case;" which was admitted over defendant's objection thereto, as "immaterial and incompetent." On defendant's appeal, the court sustained the admission of the evidence, saying:

"We think that this was not only material, but also competent. . . . The acts and declarations of a witness, which are inconsistent with his testimony, may be given in evidence against him; this evidence was, therefore, competent, and the defendant was not entitled to have it excluded upon the grounds stated by him. The rule, that a party seeking to avail himself of an exception to the admission of improper evidence on a trial must point out the particular ground of his objection, is a salutary one, and its application here is proper and

just. If the objection had been taken, that H. had not been previously interrogated in regard to this transaction, it could easily have been obviated by calling him upon the stand, and thus laying the foundation for his contradiction. A party ought not to be allowed to remain silent and conceal the real objections which he may have to the admissibility of evidence, and then, after misleading his adversary by frivolous objections, for the first time reveal his complaint in the appellate court." [1]

Remark.—Inference, that "incompetent and immaterial" is a general objection, and, particularly, that it is bad where the real objection is, not to the substance of evidence, but that a necessary preliminary to its introduction has not been observed. "Incompetent" seems to have been considered too general, and "immaterial" inaccurate.

Incompetent and immaterial.

Incompetent and immaterial.—In an action for negligence, plaintiff's physician was called as a witness in his behalf, and asked, on his direct examination: "Assuming the man's age to be . . . . years, and judging from that, and from the whole history of his case, and what you have learned of it in all ways, would you say that it is your opinion that the trouble of the heart is likely to improve?" An objection to this evidence, as "immaterial and incompetent," was overruled, and the evidence was admitted.

[1] Mead *v.* Shea, 92 N. Y., 122, 127.

The admission was sustained on appeal, the court saying:

"The objection does not specify the grounds for excluding the question, or in what respects the evidence called for by the question is improper, and it is, in effect, general in its nature. . . . It may be conceded that it would suffice, if the question was altogether an improper one, or the evidence called for in its nature quite inadmissible. But we cannot say that. . . . . The objectionable feature in the question consisted in calling for an opinion based upon witness' knowledge derived from outside sources . . . . and the question allowed witness to state possible consequences, and such as were speculative and not reasonably certain. . . . Had the objection stated these grounds, counsel might have changed the form of his question." [1]

Remark.—Intimation, that "incompetent and immaterial" is a general objection. Application of rule "(b)."

Incompetent, immaterial, etc.

Incompetent, immaterial, etc.—In an action against a bank, the chief controversy was, whether interest was to be allowed on certain deposits of money made in the bank by plaintiff's testator. Plaintiffs having given evidence tending to prove an agreement to pay interest, defendant gave counter-evidence tending to

[1] Wallace *v.* Vacuum Oil Co., 128 N. Y., 579–581.

show a subsequent arrangement dispensing with interest. In rebuttal, plaintiffs were permitted to prove, over defendant's objection that the evidence was "improper, incompetent and immaterial," the value of the use of money in the vicinity; also that testator had money in other local banks, which paid interest, and that one of those banks had offered him a specified rate of interest, for any money he might have, to deposit. On the primary appeal, the Supreme Court, at General Term, sustained the admission of this evidence, saying:

"It is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable. The authorities cited seem to uphold the doctrine, that evidence of circumstances which tend to make a proposition at issue between the parties improbable is admissible to aid the court in correctly determining such issue." [1]

But, on the further appeal, the highest Court reversed the admission of the evidence, saying:

"The testator's transactions with the other banks had no relation whatever with his transactions with the defendant. . . . While this evidence may be what is called moral evidence, more or less convincing, we are satisfied that it was illegal. . . . Evidence must legitimately tend to prove the issue between the parties. In 1 Greenl. Ev., § 52, it is said: 'This rule excludes all evidence of collateral

[1] McLoghlin *v.* Nat. Mohawk Vall. Bank, 65 Hun, 342–348.

facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute.' . . . Such evidence is too remote, inconclusive and uncertain in its bearing; and . . . . many illustrations might be put, showing that facts which constitute moral evidence, quite convincing, may yet be irrelevant, when tested by legal rules." [1]

Remark.—The words "improper" and "incompetent," used by the objector, seem to have played no part in the ultimate decision. On the other hand, "immaterial" appears to have been treated as equivalent to "irrelevant," and to have been *held* specific, and correct as a statement of the ground of objection. Hence, on the ultimate appeal, the objector stood successfully on an objection taken at the trial. Application of rule "(d)."

Incompetent, irrelevant and immaterial.

Incompetent, irrelevant and immaterial.—In an action brought to recover for personal injuries, plaintiff's physician was called as a witness in her behalf, and asked, on his direct examination: "In your opinion, is she likely to recover?" An objection to this, as "incompetent, irrelevant and immaterial," was overruled, and the evidence admitted. On defendant's appeal, the Supreme Court, at the Appellate Term, sustained the admission, and, in response to a contention of objector, that the evidence called for

[1] Same case, on ultimate appeal, 139 N. Y., 514, 522.

was "improperly allowed because it was not based on personal observation, because its scope was not limited, and it did not appear that everything upon which it was based had been presented in evidence, and that it was speculative, conjectural and eliminated the element" (*sic*) "of reasonable certainty, and that it allowed an opinion based in part upon facts outside of the evidence," said:

"None of these grounds of objection was taken at the trial, when, if it had been, it could have been obviated by other inquiry of the witness. . . . Such objection does not specify the grounds for excluding the question, or in what respects the evidence called for by the question is improper, and it is, in effect, general in its character." [1]

Remark.—Inference, that adding "irrelevant" to "incompetent and immaterial" does not give the objection a specific character.

Incompetent, irrelevant and immaterial.

Incompetent, irrelevant and immaterial.—In an action brought by an attorney, to recover for professional services rendered, a paper offered by the plaintiff was admitted, over defendant's objection that it was "incompetent, irrelevant and immaterial," On defendant's appeal, the Supreme Court, at the Appellate Term, sustained the admission saying:

"This objection did not raise the question, now

[1] Brown *v.* Third Av. R. R. Co., 19 Misc., 504; citing Wallace *v.* Vacuum Oil Co., 128 N. Y., *supra*.

argued, that it was not duly executed, not a binding or valid agreement, and that defendant was not a party to it." [1]

Remark.—Inference, that "incompetent, irrelevant and immaterial" is a general objection.

Incompetent, irrelevant and immaterial.

Incompetent, irrelevant and immaterial.—A copy of the record of a court, other than the court in which the trial was in progress, was received in evidence, over an objection that it was "incompetent, irrelevant and immaterial." On appeal, the admission of the evidence was sustained, the court saying that the objection was insufficient to raise the question whether the clerk's certificate, attached to the paper, complied with statutory requirements.[2]

Remark.—Inference, that "incompetent, irrelevant and immaterial" is a general objection, and particularly, that it is bad as a statement of the basis of opposition to evidence, based on the ground of form.

Incompetent, irrelevant and immaterial.

Incompetent, irrelevant and immaterial.—In an action brought against the directors of a corporation, based on a failure to file its annual report, to recover the amount of a promissory note, made payable to plaintiff's order and indorsed by the corporation, which

[1] MacKinstry *v.* Smith, 16 Misc., 351, 354; citing Wallace *v.* Vacuum Oil Co., 128 N. Y., *supra*.

[2] Huber *v.* Ehlers, 76 App. Div., 602, 605.

note was given in settlement of a contract between plaintiff and the maker of the note, for work to be done by the former for the latter, it appeared, on the trial, that this contract had been turned over by the maker of the note, one of the parties to the contract, to the corporation; and it became proper for the plaintiff to show that the corporation had entered into an engagement to relieve the maker of the note from liability to make payments accruing under the contract. The maker of the note was called as a witness for plaintiff, and was asked, on his direct examination: "Did the company agree to relieve you from the payments which you were to make?" To this defendants objected, as "immaterial, irrelevant and incompetent because it is not the best evidence." The objection was sustained, and the evidence excluded. On plaintiff's appeal, the court declined to reverse the exclusion, saying:

"This was objected to as immaterial, irrelevant and incompetent because it is not the best evidence. There was no evidence that the agreement was in writing. The proper objection to the question was that it called for a conclusion as to the nature of the agreement. As the error in this ruling was at best technical, the plaintiff is not in a position to urge his exception. The information sought for was relevant under a proper form of question." [1]

[1] Witherow *v.* Slayback, 158 N. Y., 649, 662.

Remark.—The feature of this decision, which first attracts notice, is that the ruling of the trial court, excluding the evidence, was *held* to be erroneous, and yet that ruling was upheld, because the error was technical. The only possible reason why the exclusion of the evidence was error, is that the objection was sufficient. There is a clear intimation that so much of the objection as referred to "the best evidence" was bad. Hence "immaterial," or "irrelevant," or both of those words, must have been deemed sufficient. Those words do not seem to have been distinguished, in the decision; and the gist of the intimation, on the subject of the quality of the objection, is believed to be, that "irrelevant" was specific and (technically) accurate—the evidence *was* irrelevant, but would have been "relevant under a proper form of question." Inasmuch, however, as plaintiff secured a new trial on other grounds, these remarks, about evidence and the objection thereto, were, doubtless, *obiter*.

Incompetent, irrelevant and immaterial.

Incompetent, irrelevant and immaterial.—In an action brought by an employee of a contractor, against his master, to recover for injuries suffered in falling from a scaffold, a witness for plaintiff, after evidence given, tending to qualify him as an expert, was asked, on his direct examination: (1) whether a scaffold, described in the question, was a safe and suitable one for a man of a specified weight; (2) what the cus-

tom was, in New York, with regard to building scaffolds for men to work upon; and (3) what the custom was as to the building of scaffolds, in New York, by contractors, for carpenters to work upon. Each time, the defendant objected to the evidence, as "incompetent, irrelevant and immaterial;" and the objection was sustained, and the evidence excluded. On plaintiff's appeal, the court reversed the exclusion, saying:

"That the trial court erred in rejecting much of this evidence, there can be no doubt. It was not objected to or rejected because of the incompetency of the witnesses. If that had been the objection, it would have been a fair matter for the trial judge to determine, whether the witnesses had the requisite knowledge or qualifications to give an opinion, or state facts as experts, and would not be a subject for review, unless against the evidence, or without support in the facts appearing in the case. But the rules determining the subjects upon which experts may testify are questions of law. The latter is the character of the rulings in this case, as the only objection was that the evidence was incompetent, irrelevant and immaterial, and it was rejected upon that ground. Obviously, the evidence offered was competent, relevant and material." [1]

Remark. Inference, that "incompetent, irrelevant and immaterial" is not a good objection to

[1] Jenks *v.* Thompson, 179 N. Y., 20, 24.

the competency *of a witness*, to give testimony. The last sentence, quoted from the Opinion, is not, it is supposed, to be taken as implying that "competent," "relevant" and "material" have, each, a separate and distinct meaning, and that the evidence in question was possessed of each of the qualities expressed by these adjectives, but merely as asserting that the evidence was wholly unobjectionable. Hence no objection could have prevailed, and no inference can be drawn from this decision, as to whether "incompetent, irrelevant and immaterial" is a general or a specific objection.

Incompetent, irrelevant and immaterial.

Incompetent, irrelevant and immaterial.—"To object to the introduction of evidence, because irrelevant, incompetent and immaterial, presents no question for review on appeal, unless the evidence on its face appears to be incompetent." [1]

Remark.—This quotation from an Opinion of a court of Indiana is almost identical with rule "(b)," for the Report of the case shows that this objection was overruled at the trial, and the exception *held* bad, on appeal. The closing reference, to evidence on its face appearing to be incompetent, is supposed to be equivalent to a reference to "evidence in its essential nature incompetent," *i. e.*, that which is manifestly and incurably inadmissible.

[1] McCloskey *v.* Davis, 8 Ind. App., 190, 197.

Incompetent, irrelevant and immaterial.

Incompetent, irrelevant and immaterial.—"Objections to evidence, that it is irrelevant, incompetent and immaterial, are generally too general, indefinite and uncertain to present any question in this court." [1]

Remark.—The Report of this case shows that the trial court admitted evidence over the objection indicated, and this ruling was *held*, on appeal, not to be erroneous, the evidence being proper for a particular purpose, mentioned. Application of rule "(b)."

Incompetent, irrelevant and immaterial.

Incompetent, irrelevant and immaterial.—In an action brought, by the vendors against the vendee and his guarantor, to recover a balance of the stipulated price of goods sold and delivered, the defence was defect in quality, and failure to deliver in proper packages. On the trial, one of the plaintiffs, called as a witness in plaintiffs' behalf, was asked, on his direct examination, whether the vendee assigned any reason for not paying the full amount, and, if so, what reason. The other plaintiff, in like manner, was asked whether, at any time after the contract was made, and the goods were delivered, any offer was made, on the part of defendants or either of them, to return the goods, or any part thereof. An objection to this evidence, as "irrelevant, incompetent and immaterial," made on the

[1] Voss *v.* State, 9 Ind. App., 294.

part of the defendants, was overruled, and the evidence admitted. On defendants' appeal, the Supreme Court sustained the admission saying:

"The objections were general, against their admissibility for any purpose whatever. It is clear enough that, had the vendee been the sole defendant in the action, the evidence objected to would have been admissible as against him. If, as to his co-defendant, a different rule would obtain, by reason of the latter being a guarantor only, a question not necessary to consider, the objection should have been limited accordingly, or an instruction asked." [1]

Remark.—Inference, that "incompetent, irrelevant and immaterial" is a general objection, and of no more efficiency than "inadmissible," or "improper."

Incompetent, irrelevant and immaterial.

Incompetent, irrelevant and immaterial.—In an action brought by a physician, to recover for professional services, in which the Answer of defendant denied that plaintiff was duly qualified, registered and authorized to practice medicine in the county, after proof that plaintiff was a regular physician, defendant offered in evidence a volume purporting to be a register of physicians, to substantiate her denial. To this plaintiff objected, as "incompetent, irrelevant and immaterial;" whereupon the

[1] Voorman *v.* Voight, 46 Cal., 392, 397.

evidence was excluded. On defendant's appeal, this ruling was reversed, the court saying:

"The exclusion of the record was error. The objection was that it was incompetent, immaterial and irrelevant. No specific ground for the objection was given. The record was offered as, and stated to be, a public register of physicians and surgeons of Kings County, and this was not questioned. If the plaintiff had desired to raise a question as to its being a public record, his objection should have been specific, and the defendant then would have been called upon to prove the authenticity of the volume by showing the source of its production, and that it was kept by authority. No such objection having been made, we must assume it to have been waived." [1]

Remark.—"Incompetent, irrelevant and immaterial" is a general objection. The decision is an application of a corollary of rule "(a)." The ruling of the trial court, excluding the evidence upon a mere general objection, was *not* upheld, on appeal, because no "ground in fact existed for the exclusion."

Incompetent, irrelevant, immaterial, etc.

Incompetent, irrelevant, immaterial, etc.—In an action to recover commissions for effecting a sale of chattels, the purchaser having been called as a witness for defendant, and testified that plaintiff was not the

[1] Acetta *v.* Zupa, 54 App. Div., 33, 34.

procuring cause of the sale, a witness for plaintiff was allowed to testify to a statement made by the purchaser, out of court, inconsistent with his testimony, over defendant's objection to the evidence, as "incompetent, irrelevant and immaterial, and that it was not in the presence of defendant." On defendant's appeal, the General Term of the New York Common Pleas sustained the admission of the evidence, saying:

"The objection was made upon the general grounds of incompetency, irrelevancy and immateriality, the specific ground stated being that it was not in the presence of defendant. This latter ground presented no proper objection, and the general grounds advanced did not call for the exclusion of the evidence. It was properly admitted for the purpose of contradiction, and the technical objection of incompetency, etc., cannot be considered as raising the question of its proper foundation where such objection could have been obviated by proof upon the trial." [1]

Remark.—Inference, that "incompetent, irrelevant and immaterial" is a general objection. The condemnation of this portion of the objection was an application of rule "(b)"; and that of the remainder of the objection, an application of rule "(d)."

[1] Frankel *v.* Wolf, 7 Misc., 190, 192.

Incompetent, irrelevant, immaterial.

Incompetent. Irrelevant. Immaterial.—"It may in many cases suffice to object to evidence as irrelevant, because the irrelevancy of the evidence is self-apparent, but it is in no case a sufficient specification, to say that the evidence is incompetent, because the reason for the claim of incompetency can always be fully stated. The general terms of objection, immaterial and impertinent, are mere epithets, and, in their application to evidence, have no legal meaning." [1]

Remark.—Inferences, that (1) "incompetent" is general, (2) "irrelevant" is specific, and (3) "immaterial" is unmeaning.

Incompetent; irrelevant and immaterial.

Incompetent. Irrelevant and immaterial.—"It is not enough to state that the evidence is incompetent, or that it is immaterial and irrelevant. This much is implied in the mere fact of objecting. . . . It is no answer to the proposition asserted by the authorities" (*i. e.*, that objections, to be of any avail, must be reasonably specific), "to say that the evidence itself may reveal the objection, for this may be said of all incompetent and irrelevant evidence, when carefully scrutinized." [2]

Remark.—Inference, that "incompetent," uttered alone, equally with "immaterial and irrelevant," is a general objection.

[1] Glenville *v.* St. Louis R. Co., 51 Mo. App., 629, 631.

[2] Ohio, etc., R. Co. *v.* Walker, 113 Ind., 196, 200.

Irrelevant, immaterial, etc.

Irrelevant, immaterial, etc.—In an action for an accounting as to partnership transactions, brought by the personal representative of a deceased partner, plaintiff offered in evidence certain letters written by her testator, and letters written by testator's attorney, to defendant, asking for information concerning the assets and liabilities of the firm, and containing propositions with a view to an adjustment and a settlement; to most of which letters there had been no reply. The letters were received in evidence, over defendant's objection that they were "irrelevant, immaterial and declarations in plaintiff's own favor." On defendant's appeal, the court sustained the admission of the evidence, saying:

"Some of these letters to which no reply was made may be subject to the objection that they contain declarations in favor of the plaintiff; but it is to be borne in mind that this is an equity suit, in which a reversal should not be had for an error in the admission of evidence unless it was manifestly prejudicial. The plaintiff had a right to show that he endeavored to adjust the matter before bringing the action, as this would have a material bearing upon the question of costs. We are of opinion that, although the reception of some of the letters, without limiting their bearing, may have been erroneous, it does not constitute substantial error or require a reversal." [1]

[1] Jackson *v.* Jackson, 100 App. Div., 385, 388.

Remark.—Here, apparently, "irrelevant" and "immaterial" went for nothing. The rest of the objection was specific and accurate; and the decision sustaining the admission of evidence over a good objection is valuable as an illustration of the rule that, in equitable actions, less strictness is observed, in condemning the admission of objectionable evidence, than in those tried with a jury.

No ground of objection stated.

No ground of objection stated.—In an action brought to recover damages for injuries suffered by plaintiff, through falling in the street of a city, in consequence of defendant's negligence, physicians, called for plaintiff, were permitted to testify as to the cause of plaintiff's ill-health, defendant opposing the introduction of the evidence by using the words "objected to." On defendant's appeal, the court sustained the admission of the evidence, saying:

"These objections were general, and failed to specify any grounds. This court has *held,* that, where the objection to evidence is general, and it is overruled, and the evidence is received, the ruling will not be *held* erroneous, unless there be some grounds which could not have been obviated had they been specified, or unless the evidence in its essential nature be incompetent. . . . But the questions addressed to the physicians, calling for their opinions as to whether the physical condition in which they found the plaintiff to be, upon

their examination of her, could have resulted from a fall, were not objectionable and infringed upon no rules of evidence." [1]

Remark.—Application of rule "(b)."

No ground of objection stated.

No ground of objection stated.—"In no instance was the ground of objection to evidence offered stated, which omission renders the exception valueless for purposes of review, the evidence admitted being intrinsically competent." [2]

Remark.—This passage from an Opinion has been quoted because of its use of the expression "evidence intrinsically competent," which is supposed to be equivalent to "evidence *not* in its essential nature incompetent."

No ground of objection stated.

No ground of objection stated.—In an action to recover damages for injury suffered at a railroad crossing, two physicians, called as witnesses for plaintiff, were asked, on their direct examinations, to testify as to future consequences of the injury. Fourteen times defendant's counsel interposed the words, "objected to," and, in each instance, the evidence was received. On defendant's appeal, the court reversed a judgment for plaintiff, on the ground of error in the admission of the evidence; and plaintiff's motion for a re-argument, based on the alleged

[1] Turner *v.* City of Newburgh, 109 N. Y., 301, 308.

[2] Adams *v.* Burr, 13 Misc., 247, 249.

insufficiency of the objections, was denied, the court saying:

"In deciding upon the appeal in this case, it did not escape our attention that the objections to the admission of the evidence, which we held to be incompetent, were general. That point was discussed in consultation, but we consider that the evidence was in its nature inadmissible, as it related to speculative and conjectural possible future consequences which might be apprehended from the injury, and how long after the injury such consequences might be developed. The course of the examination shows that the ground of the objections could not have been misunderstood, and if it had been specified in the objections, could not have been obviated." [1]

Remark.—Application of rule "(b)." The passage quoted is valuable as indicating, with satisfactory clearness, that the words, "in its essential nature incompetent," in that rule, are the equivalent of the words, "in its nature inadmissible;" whence an inference that incompetency, predicated of evidence, without qualification, is nothing more nor less than inadmissibility.

No ground of objection stated.

No ground of objection stated.—In an action for libel, plaintiff, testifying in his own behalf, was allowed to give evidence tending to show the amount of damage caused to his

[1] Tozer *v.* N. Y. C. & H. R. R. R. Co., 105 N. Y., 617, 659.

business, over objections, by defendant, which are stated, in the record, thus: "Defendant's counsel objects." On defendant's appeal, the admission of the evidence was sustained, the court saying:

"The objections of the defendant's counsel, to the questions put, were general in their character, and stated no specific ground upon which the testimony should be excluded. The counsel for the appellant claims that the proof of special damages was not admissible under the pleadings because it was not properly pleaded. Had this point been taken on the trial, and the objection held to be valid, the judge had the power to allow an amendment of the pleadings upon such terms as would be proper and just, and, had he done so, the objection might have been obviated. The rule is well established, that, where there is a general objection to evidence, and it is overruled, and the evidence is received, the ruling will not be held erroneous, unless there be some grounds which could not have been obviated, or unless the evidence in its essential nature be incompetent." [1]

Remark.—Follows Tooley *v.* Bacon, *supra.*[2] Applies rule "(b)."

Wrong specification.

Wrong specification.—In an action brought to recover on a policy of marine insurance, in which an issue was raised as to the value of the vessel concerned, an expert

[1] Bergmann *v.* Jones, 94 N. Y., 51, 58.

[2] 70 N. Y. 34.

witness was called, for plaintiff, and permitted, on his direct examination, to testify as to the value, over defendant's objection "that the witness had no personal knowledge of the vessel." On defendant's appeal, the admission of the evidence was sustained, the court saying:

"It was not a sufficient objection to the competency of this witness, that he had no personal knowledge of the ship. An expert is qualified to give evidence as to things which he has never seen. He may base an opinion upon facts proved by other witnesses, or upon facts assumed and embraced within the case. . . . There was no objection that the witness did not have sufficient facts before him, upon which to base his opinion as to the value of the ship. The sole objection was, that he did not have personal knowledge of the vessel. It seems to have been assumed that the character, condition and quality of the vessel were sufficiently proved, and that all the conditions existed, which would qualify the witness to give an opinion as to value, except that of personal knowledge; and that, as we have seen, was not necessary. If the defendant had requested that the facts appearing in the evidence should be assumed, and stated in a hypothetical question, it is fair to assume that his request would have been complied with." [1]

Remark.—Application of rule "(d)."

[1] Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y., 56, 64.

Immaterial. Irrelevant.—In an equitable action, brought to set aside transfers of personal property, the court, on appeal, referred to certain evidence admitted on the trial as follows:

Immaterial.
Irrelevant.

"It may be, that some of this testimony was immaterial upon the issue, but the bulk of it was not only material and relevant, but important as bearing upon the issue litigated. So far as it was immaterial or irrelevant to the issue, it did not work harm to the defendants. . . . There is nothing, therefore, in the rulings upon the admissibility of evidence upon the trial which calls for reversal of the judgment." [1]

Remark.—Possible inference, that "material" and "relevant," also "immaterial" and "irrelevant," as applied to evidence, are, severally, substantial synonyms. Also, a reminder that, in equitable actions, an inference of prejudice from the allowance of immaterial evidence is not readily indulged.

Immaterial. Irrelevant. Incompetent.—In an action brought by a business corporation, successor to a brewing firm, a family affair, against the personal representatives of a deceased member of the firm and of the family, to recover moneys alleged to have been received by said decedent, for the account of the firm, and not accounted for, and moneys alleged to have been

Immaterial.
Irrelevant.
Incompetent.

[1] Fox *v.* Erbe, 100 App. Div., 343, 348.

obtained by him, from the firm, by false representations (one of the two defendants having died *pendente lite*, and before trial), the Answer to the Complaint contained, besides a general denial, allegations purporting to be by way of defence, which, however, were not germane to the real issue, but related to transactions between F., an attorney, and the surviving defendant, individually, and to acts of the plaintiff corporation in paying salaries to its officers. As tending to sustain those irrelevant allegations of the Answer, defendant was permitted to introduce evidence of an agreement between F. and said surviving defendant, who was a stockholder, under which the former purchased, for $150,000, the stock and bonds of the latter, of the par value of $550,000; also evidence to the effect that F., who had been elected president of the corporation, received a salary of $15,000, a year, afterwards increased to $25,000, and that his brother-in-law received $5,200, a year, as vice-president, etc. To this evidence plaintiff objected, as "immaterial." The trial court overruled the objection, saying: "It may have no bearing at all, but I think it proper to allow it in the case for what it may hereafter be worth." A verdict and a judgment having been rendered in favor of defendant, the Appellate Division, on defendant's appeal, sustained the admission of the evidence because the objections to the improper evidence were regarded as insufficient, saying:

"The basis of the objection was, that it was immaterial to any issue presented by the pleadings. The plaintiff, however, nowhere claimed, upon the trial, that it was prejudiced by the introduction of such testimony. Its sole complaint was that it was immaterial as bearing upon any issue. Upon this appeal, it is argued, that it was not only immaterial, but incompetent, improper and prejudicial. It was the duty of counsel to call the court's attention to the ground of objection. Had the court's attention been called thereto, doubtless it would have excluded it, or it might have been withdrawn. The question as now sought to be presented was not raised. When the objection was made that the testimony was immaterial, it was conceded to be competent." [1]

Remark.—A noticeable feature of this Opinion is, the intimation that, where counsel objects to evidence as "immaterial," and is overruled, and afterwards urges, on appeal, that the evidence was "incompetent, improper and prejudicial," he makes a new contention, *i. e.*, one which he did not bring to the attention of the court below. It might have been supposed that a presumption of prejudice arises from the allowance of immaterial evidence over an objection to it, taken on the ground of its immateriality; and it is difficult to see how urging incompetency and impropriety involved a change of base.

[1] Groh's Sons *v.* Groh, 80 App. Div., 85, 94.

On the further appeal, the highest Court reversed the admission of the evidence, declaring the objection taken on the trial sufficient, and saying:

"The judgment was affirmed because the objections to the improper evidence were regarded as insufficient. We entertain a different view. When evidence is immaterial, and is objected to on that specific ground, the objection is well taken, because it points out the precise ground upon which the evidence should be excluded, and that is all the objector is required to do. It frequently happens that evidence which is immaterial is also incompetent and irrelevant, and in that event it may properly be objected to on all or either of these grounds. It is equally true, that evidence may be incompetent but neither immaterial nor irrelevant, or *vice-versa*, in which case the objection may and should be urged upon the precise ground that provokes it. And the reason of the rule is plain. If evidence is admissible upon one ground, and is objected to upon another ground, the trial court is not advised of the true reason for its rejection, and the objector is *held* to have waived it. In the case at bar, some of the evidence objected to was immaterial, irrelevant and incompetent. It might have been objected to on all or each of these grounds. It was objected to only as being immaterial. It was, however, so utterly and clearly immaterial, as to point out clearly its incompe-

tency as well as its irrelevancy. The objection having been taken upon a ground that was proper and precise, and being obviously suggestive of the other two grounds upon which the evidence might have been excluded, we think the cases cited by the learned Appellate Division in support of the conclusion that the objections herein were not properly taken have no application." [1]

Remark.—The observations which will be made on this decision of the highest Court will be comprised under two heads:

First, as to what was *held.*—It is necessary to assume a meaning of "material," and of "immaterial." Accordingly, the latter term will be assumed to mean, as applied to evidence, that which has no bearing on the issue. Such an objection manifestly goes to the substance. Here, then, it is squarely *held*, that, when proposed evidence *is* "immaterial," an objection employing (only) that word is specific, and well taken. Does this decision imply, or even leave room for an inference that, if evidence that is *material* were objected to as "immaterial," the objection would not be specific? It is believed not. If evidence really material were objected to as immaterial, the objection would not be well taken, but its specific character would not be altered. An illustration will demonstrate this. Suppose that evidence is objected to on the ground that it does not come within the

[1] *Id.*, 177 N. Y., 8, 14.

pleadings, and a proper construction of the pleadings leads to the conclusion that the objector is mistaken. Obviously, the objection is specific, notwithstanding the error in the contention. A specific objection is one which points out the precise ground upon which *it is contended* that the evidence ought to be excluded. So that we have, at length, an explicit and authoritative decision that "immaterial," as an objection to the admission of evidence, is always specific.

Second, as to other intimations, to be gathered from this Opinion.—The statement, that it frequently happens, that evidence which is immaterial is also incompetent and irrelevant, properly implies that such is not invariably the case; *i. e.*, there is evidence which is immaterial and yet cannot be said to be *both* incompetent and irrelevant. But whether this last proposition involves a doctrine that there may be evidence which is immaterial but not irrelevant, *quære?* Again, it is said, that evidence may be incompetent, but neither immaterial nor irrelevant, or *vice-versa*. It is difficult to determine what the converse proposition, indicated in this alternative is. The most manageable interpretation of the entire expression is, that (1) evidence may be inadmissible, for some reason, which, nevertheless, is not essentially foreign to the issue, and (2) evidence may be essentially foreign to the issue, and yet not open to objection as violating any technical or formal rules affecting

its admissibility. A condition of this interpretation is a concession of the substantial identity of materiality and relevancy. It is further said: "some of the evidence objected to was so utterly and clearly immaterial as to point out clearly its incompetency as well as its irrelevancy." This would appear to imply that, if the immateriality had not been so extreme and patent, neither its incompetency nor its irrelevancy might have been clearly pointed out; but whether this involves a doctrine, that immaterial evidence is ever relevant, is uncertain. The embarrassment experienced, in endeavoring to reach satisfactory conclusions as to the real import of these judicial intimations, is due the circumstance that the Opinion contains no *definition* of either of the words, incompetent, irrelevant and immaterial, and no unmistakable indications of the respective contents of those adjectives. Finally, in the assertion, that some of the evidence, of which it is said that it was immaterial, irrelevant and incompetent, "might have been objected to on all or each of these grounds," is contained a caution—perhaps not imperative—to counsel, not to use all three of the words, in objecting, unless he *means* them all.

Conclusions relative to objections.

It remains to gather the results of the foregoing examination of cases adjudicating upon particular objections, and those of the preliminary study, and attempt to express them in the form of practical conclusions upon the

subject of the mode of objecting to evidence, including a question as to the propriety or advisability of employing the formula, "incompetent, irrelevant and immaterial."

CONCLUSIONS:

The following propositions are submitted, as inferable from the weight of authority:

Two classes of objections.

1. All possible objections to evidence, under our system, are divisible into two radically distinguishable classes: viz.: *First*, those which assert an inherent lack, in the proposed evidence, of a legal bearing on the issue; *Second*, those which assert that the admission of the evidence would violate one or more of the numerous rules (some substantial, and some formal) which have been adopted, restricting admissibility on other than such logical grounds.

Incompetent, as an objection.

2. "Incompetent," as an objection to evidence, is broadly *general*, means neither more nor less than "inadmissible" or "improper," and is co-extensive with both of the aforementioned classes of objections; but contains no intimation as to which class it operates under, in any given case, and none as to which of the many possible items, if any, under the second class is intended.

3. "Immaterial, as an objection, is identical with "irrelevant"; each belonging exclusively to the former of the two aforementioned classes of objections. Each term, when employed in objecting to evidence, marks the objection as specific.

Immaterial or irrelevant, as an objection.

4. Where the real contention is, that proposed evidence has no bearing on the issue, "immaterial" (alone), or "irrelevant" (alone), is a good, and the only proper univerbal, objection: and to use both words would be simply tautological.

Id.

5. It is never of any avail to say "incompetent," in objecting; to do so is merely equivalent to saying: "I object." And this holds, whether "incompetent" is used alone, or in connection with other descriptive terms, or with explanations.

"Incompetent" is nugatory.

6. Material (or relevant) evidence is that, between which and the fact in issue, there is a relation of cause and effect, or of concomitance according to the course of general experience. To object to proposed evidence, as irrelevant (or immaterial), is to assert that no legally recognizable relation of cause and effect, or of concomitance, exists between the evidentiary- and the issue-fact; or that too many intermediary causes and effects render the evidence "too remote"; or that the concomi-

Essence of materiality or relevancy.

tance is too infrequent to justify a legal inference.

"Incompetent, irrelevant and immaterial" objectionable.

7. The expression "incompetent, irrelevant and immaterial" should not be uttered, as stating an objection, both for the reason above given (5), and because to use that expression is to combine a general and a specific objection.

8. Whenever there is no contention, that proposed evidence has no bearing on the issue, no one word (unless "hearsay" be an exception) is available; but the objector should particularize the exclusory rule which he considers would be violated by the admission: in doing which there is no compulsion to employ technical language, and no danger in being inartistic, diffuse or even repetitious in elaboration.

Id.

9. "Incompetent, irrelevant and immaterial" is neither a general nor a specific objection. It is a combination of the two kinds; and the cases seemingly to the effect that it is *general*, are explainable as referring to attempts to indicate, by this phrase, a ground of objection coming within the second of the two classes suggested in proposition "1," *supra*; "incompetent" properly covering both classes, and the two other attributives not being within the second class.

Multifariousness.

10. It is suggested: Never say "incompetent", for it is useless; never say "irrelevant *and* immaterial", for it is repetitious.

Most available objections.

11. The objections most likely, when overruled, to ground a good *exception*, have no stereotyped or technical form. The criterion of availability is, that, in a manner however informal and diffuse, they indicate clearly the exclusory rule sought to be enforced.

SECTION III.

Striking Out and Disregarding Evidence.

General description of the contents of this section.

Under this head, a reference will be made to decisions which, at first sight, might be considered paradoxical, holding, as they seem to do, that objectionable evidence can be eliminated at the instance of a party who offered no opposition to its introduction when it was offered, though a ground of objection to such introduction was, at that time, discernible.

The cases first to be cited will be such as appear to be in accord with a familiar, general rule.

Necessity for objecting where ground is apparent.

In an action brought by an administrator, to recover for services rendered by the intestate, to defendant, the latter was examined *without any objection*, on the part of plaintiff, as to matters involving personal communications with the decedent. Thereafter, the referee struck out this testimony, on the ground that defendant was incompetent so to testify, under a familiar statute. On defendant's appeal, the court reversed this action of the referee, saying:

"Any and every objection which could be taken

to his testifying, or to his testimony, was apparent on the face of the proceedings; and yet, at a subsequent hearing, the referee struck out the testimony, on the alleged ground that the defendant was incompetent to testify. This will not do. A party against whom a witness is called, and examined, cannot lie by, and speculate on the chances, first learn what the witness testifies, and then, when he finds the testimony unsatisfactory, object either to the competency of the witness or to the form or substance of the testimony. It is not the case, which sometimes occurs, where, on cross-examination, or in a subsequent stage of the trial, the incompetency of evidence appears, though apparently competent when given, *e. g.*, oral proof of an agreement, which on cross-examination appears to have been in writing." [1]

Remark.—This passage from an Opinion appears to lay down the rule that, where there is *any ground* of objection to evidence which is apparent when the evidence is offered, a party interested in excluding it must object, then and there, at his peril.

Motion to strike out evidence not completed.

On the trial of an action brought against an indorser of a promissory note, the only material issue presented was, whether notice of presentment to the makers, for payment, had been properly served on the defendant. The statute, in force, made a no-

[1] Quin *v.* Lloyd, 41 N. Y., 349, 354; Dec., 1869.

tary's certificate of the presentment, *by him*, for payment, and of protest for non-payment, presumptive evidence of the facts stated therein, unless defendant (indorser) annexed to his plea an affidavit denying receipt of notice of non-payment. Defendant had served an affidavit of such denial on plaintiff's attorney, but had not annexed it to his Answer to the Complaint. Plaintiffs opened their case by offering a notary's certificate, stating that *the note was presented* to the maker, for payment (which was refused), and that thereupon he, the said notary, did protest the same; which certificate was received, over defendant's objection that his Answer was an affidavit, within the meaning of the statute, and, if not, that an affidavit (which did not refer to the Answer) had been served, and issue had been joined, and noticed for trial by both parties. The notary having been afterwards called, as a witness for plaintiffs, and having testified that the presentment was made, not by him but by his clerk, defendant moved "to strike out of the evidence the said certificate, on the ground that the note in question was not presented by said notary, and the certificate was therefore false"; which motion was denied. On defendant's appeal, the court sustained the denial of this motion, saying:

"It is claimed . . . . that the sworn Answer of the defendant was an affidavit within the meaning of the statute. This claim is not well founded. . . . The court did not, therefore,

err in receiving the certificate in evidence at the time it was offered. Afterward, it appeared that the notary did not in person present the note for payment, but that it was done by his clerk. Hence the certificate was void, and could with propriety have been stricken out upon the motion of the defendant. But where evidence has been properly received, I do not understand that the party against whom it has been introduced has the absolute right to have it stricken out when its effect has been destroyed by other evidence. His proper course is to protect himself against the effect by a proper charge from the court. In this case the defendant should have requested the court to charge the jury that the certificate was no evidence to be considered by them upon the question of presentment of the note, and if this had been refused he would have had a good exception. But the certificate was entirely ignored in the charge to the jury. And, on the question of presentment, the court put the case to the jury upon the other evidence. Hence no error was committed in refusing to strike out the certificate upon the motion of the defendant." [1]

Remark.—This decision is supposed to state the doctrine that, where, on a trial by jury, evidence, properly received, is afterwards discovered to be illegal (1) the court has a discretion to grant or refuse a motion to strike it out, and (2) the party, against whom it is offered, in order to secure a

[1] Gawtry *v.* Doane, 51 N. Y., 84, 89; Sept., 1872.

good exception, must move for a direction, to the jury, to disregard it. To the unskilled mind it may be a difficult problem to distinguish between the effect of striking out evidence, and directing the jury to disregard it. Manifestly, the former expedient is the only one available in trials by the Court. The closing sentences in the quotation from the Opinion seem, however, to impress the statement of the general doctrine with the character of an *obiter dictum*, as it was, apparently, deemed necessary or proper to point out the way in which the case was given to the jury, as a ground for sustaining the trial court's refusal to strike out the evidence.

Timely objection generally necessary.

"A party may . . . . waive the objection to . . . . incompetent evidence by omitting to make any objection. . . . Usually the objection must be made when the incompetent evidence is offered. . . But if the objection be not made at the time, and the omission be shown to have been from mistake or inadvertence, the trial court may permit it to be made at any time before the close of the trial, by motion to strike out the incompetent evidence. . . . . When the objection is not made at the time the evidence is offered or given, it is in the discretion of the trial judge to permit it to be made at a later stage of the trial." [1]

[1] Miller *v.* Montgomery, 78 N. Y., 282, 286; Sept., 1879.

Remark.—This quotation, it will be observed, makes no reference to a motion for a direction, to a jury, to disregard evidence, as distinguished from a motion to strike out; and the intimation is that the discretionary power of the court, to grant a motion to strike out, is properly exercised only where the omission to interpose a timely objection to the admission of the evidence arose from mistake or inadvertence.

Distinction between striking out and disregarding evidence.

In an action brought against defendant as indorser of a promissory note, dated April 4th, 1870, for $2,000, made by B., payable in thirty days, to the order of defendant, purporting to have been indorsed by him, and alleged to have been duly transferred to plaintiff, the defence was, that the indorsement was a forgery. On the trial, it appeared that B. had procured a prior note, dated March 28th, 1870, for the same amount, made by him, and having thereon defendant's name as indorser, to be discounted at a bank which had given to B. drafts for the amount; that, the note last mentioned falling due, B. offered to the bank the first mentioned note to be discounted in renewal of the due note, which the bank declined; that thereupon B. made a third note, for the same amount, dated April 4th, 1870, payable, in fifteen days, to the order of plaintiff, who indorsed the same; which last mentioned note the bank dis-

counted, B. turning over the note in suit to plaintiff as security. This fifteen-day note was paid by plaintiff at maturity: whence the action. Plaintiff was permitted to introduce the bank-drafts in evidence, over an objection by defendant's counsel, to the same, as "irrelevant, incompetent and immaterial, and on the ground that there is no proof that they went into Mr. King's hands." On defendant's appeal, the court sustained the admission, holding that the evidence was competent as part of the *res gestæ*, and also as laying the foundation for other evidence which might connect defendant with the transaction, and as showing that the note which formed the consideration of the alleged indorsement had a valid inception; also that the objection of lack of "proof that they went into" (defendant's) "hands" went to the order of proof simply, which was in the discretion of the Court. After the drafts were admitted, defendant moved "to strike out the drafts and all evidence in regard thereto," which motion the trial court denied. On the appeal, the Court of Appeals *held* that "this did not constitute a ground for a legal exception; that, the evidence having been properly received, it could be retained at the discretion of the court, and the remedy of the party was to ask the Court to instruct the jury to disregard it." [1]

Remark.—This case has been given on account of

[1] Marks *v.* King, 64 N. Y., 628, 629; Feb., 1876.

the pointed distinction made by it between a motion, in a jury cause, to strike out evidence, and a motion for instructions, to the jury, to disregard it. Some of the *facts* are incorrectly stated in the memorandum of the case;[1] a circumstance which renders the report unintelligible. In addition to this defect in the report, the head-note is incorrect, in including evidence admitted "without objection," as that question was not presented. The quotation of that head-note, in the Opinions in subsequent cases, as a statement of what was decided, has tended to create confusion in the law. The printed head-note reads as follows:

"Evidence admitted upon a trial by jury, *either without an objection or* properly under objection, which for any reason should not be considered by the jury, is not necessarily to be stricken out on motion, but may be retained in the discretion of the court; the remedy of the party is to ask for instructions to the jury that they disregard it."[2]

Motion for instruction, to jury, to disregard evidence, when the only remedy.

In an action on an indictment for assault, the district attorney offered certain promissory notes and a book of accounts in evidence, and, no objection being made, they were received and read. The complainant and other witnesses were then called, and gave testimony tending to show that the notes were forgeries, and entries from the book were also read for the same purpose.

[1] *Id.*

[2] The italics are not in the original.

Afterwards defendant's counsel moved that the court direct the jury to disregard all the evidence tending to establish the forgery of the notes; which motion was denied. On appeal, the denial of this motion was affirmed, the court saying:

"The notes and book were offered and received in evidence without objection from the defendant's counsel. The evidence of the complainant, to the effect that the notes were forgeries, ... had been given without objection, and the witness had been cross-examined in regard thereto. . . . After such acquiescence . . . . it is too late to ask that the objectionable matter be stricken out. If any objection to it could fairly be made, it was as apparent when the evidence was offered as after it was in, and by not objecting to it when offered, the defendant took the risk of having the court, in its discretion, refuse to exclude it. In Marks *v.* King, 64 N. Y., 628, it was held that evidence admitted upon a trial by jury, *either without an objection, or* properly under objection, which for any reason should not be considered by the jury, is not necessarily to be stricken out on motion, but may be retained in the discretion of the court. And it was also *held* that the remedy of the party is to ask for instructions to the jury to disregard it. This decision was followed in Platner *v.* Platner, 78 N. Y., 90, and the question now before us is directly within both cases. The attention of the trial court was not again called

to the subject, nor was any request made for instructions in regard to it." [1]

Remark.—The tenor of this Opinion seems to imply that, in a case tried with a jury, a motion for instructions to the jury to disregard evidence, under the circumstances referred to, is the only remedy of a party who seeks to avoid the effect of evidence which has been admitted.

The same. In an action on a promissory note, made by defendants, payable to plaintiff or bearer, one of the defendants, being called as a witness on the part of defendants, was asked, on his direct examination, to state a conversation about the note, had between witness and plaintiff's husband, since deceased; whereupon the following colloquy occurred, as shown by the Case on Appeal:

Plaintiff's counsel: "Objected to, as hearsay, irrelevant and improper, and on the grounds that it is not shown that Stephen Platner" (plaintiff's deceased husband) "had any authority to act for the plaintiff, and also is a violation of Section 399."

The Court: "I will hear the proof, and if the necessary proof of his authority isn't made out, I will take care of it."

At the close of the evidence on this subject, plaintiff moved to strike out the testimony as to this conversation; which motion was denied. On

[1] Pontius *v.* People, 82 N. Y., are not in the original. See p. 85, 339, 346; Oct., 1880. The italics *supra.*

plaintiff's appeal, the Court of Appeals upheld the trial court, in this denial, saying:

"'The testimony was allowed on the notion that knowledge and acquiescence would be brought home to the plaintiff. It may be conceded that this was not done. It may be conceded, also, that, when the motion to strike out was made, the defendants had made an end of their evidence as to the . . . . note. The motion to strike out was then made. It was not renewed, nor the matter again noticed. It should have been. 'Evidence admitted either without objection, or properly on objection, which for any reason should not be considered by the jury, or affect the result, is not necessarily stricken out, but may be retained in the discretion of the court, the remedy of the party being to ask for instructions to the jury to disregard it.' There was no request to instruct the jury to disregard the evidence, and no exception to the charge of the judge in respect to it, and the weight to be given to it. See Opinion of ALLEN, J., in Marks *v.* King, 64 N. Y., 628." [1]

Remark.—Here it is squarely *held* that, in a jury cause, a motion to strike out evidence is not available as a substitute for a motion for instructions, to the jury, to disregard it. The quotation, in the Opinion, of the erroneous head-note of Marks *v.* King did no harm, as, in both cases, there was an objection taken to the evidence, when offered.

[1] Platner *v.* Platner, 78 N. Y., 90, 101.

Speculative silence condemned.

"It is entirely clear that a party who has sat by, during the reception of incompetent evidence without properly objecting thereto, and has thus taken his chance of advantage to be derived therefrom, has not, when he finds such evidence prejudicial, a legal right to require the same to be stricken out. But even if the referee or surrogate could, in their discretion, strike out any of the testimony, no request was made that either should do so." [1]

Remark.—This *dictum* clearly condemns the practice of speculative silence, where evidence is offered, and refers exclusively to a motion to strike out; this being the only possible motion, as there was no jury.

Motion to strike out uncompleted evidence.

In an action brought by an Illinois corporation, to recover an unpaid subscription to stock, the only substantial question was as to plaintiff's existence as a corporation. To prove this, plaintiff offered certain papers from the office of the Secretary of State, of Illinois, but there was no proof that, by the law of Illinois, these papers established plaintiff's corporate character. To this evidence defendant made specific and elaborate objections, which were overruled. On defendant's appeal from a judgment which was rendered in plaintiff's favor, the Court refused to reverse, saying:

"The documents from the office of the Secretary

[1] Matter of Accounting of Morgan, 104 N. Y., 74, 86; Jan'y, 1887.

of State of Illinois were received in evidence against the defendant's objection and exception. In order to give them proper effect, they should have been supplemented by proof of the law of that State, but they were competent as part of the chain of proof on the issue. When the plaintiff failed to follow them up by proof of the law which gave them efficacy, a motion to strike out was the defendant's remedy, and no such motion was made. When evidence tending to prove a material fact in issue is received under objection, and which requires proof of other facts to make it complete, which have not been supplied, its presence in the record is no ground for reversal, in the absence of a motion subsequently to strike it out. The failure of the plaintiff, to supplement the documentary evidence with proof of the law, should have been raised by such a motion, as the ruling admitting the papers was correct when made." [1]

Remark.—Decision, that when certain links, only, in the chain of proper proof are admitted, at the instance of a party, his opponent's only remedy, for a failure to complete the proof, is a motion to strike out.

Speculation condemned.

"It will not do to take a general objection which is not good, or speculate upon what a witness may testify to, and then, if not agreeable to the one against whom the

[1] U. S. Vinegar Co. *v.* Schlegel, 143 N. Y., 537, 544; Nov., 1894.

testimony is given, move to strike out such testimony, or, upon appeal, seek to destroy the effect thereof, by presenting specific objections which would have been good had they been presented at the time the testimony was given." [1]

Remark.—Condemnation of speculative silence, or generality of objection, when evidence is offered. No reference to motion for instructions, to jury, to disregard.

Motion to strike out, *and* for instruction to disregard.

"In most cases, an abstract consideration of the several evidential facts would not suffice to show their relevancy or materiality to the alleged ultimate fact. Segregated, the evidential facts rarely, if ever, appear to be relevant or material. Aggregated, their relevancy or materiality may be irrefragable. Logically, therefore, no error is to be predicated by the admission of competent evidence, the irrelevancy or immateriality of which is not apparent at the time. If the rule were otherwise, it would be difficult to conceive a case, where error could be avoided, except at the risk of a denial of redress. It was incumbent upon the plaintiff's counsel, therefore, when the prejudicial character of the testimony objected to was apparent, from the defendant's subsequent failure to connect the plaintiff with the facts in evidence therefrom, to ask the trial court to strike such testimony out, *and* [2] to instruct the

[1] Jewel. Mer. Agency *v.* Jewel Pub. Co., 84 Hun, 12, 19; Jan'y, 1895.

[2] Italics, not in the original.

jury to disregard it. An exception to an adverse ruling upon such a request, and not otherwise, would have enabled us to consider the effect of the admission of such testimony"; citing U. S. Vinegar Co. *v.* Schlegel, *supra*.[1]

Remark.—Apparent intimation that, under the circumstances referred to, the party, seeking to avoid the effect of evidence admitted, should move, *both* to strike out, *and* for an instruction, to the jury, to disregard.

Thus far, the cases cited in this section have not contained any explicit statement of doctrine, that a party can safely sit silent when evidence is offered by his adversary, and afterwards, by suitable motion, avoid its effect, *as a matter of right*. It remains to ascertain whether such a doctrine is contained in any cases, and if it be, how those cases are to be reconciled with the principles heretofore enunciated.

Irrelevant evidence avoidable without objection.

In an action brought by a passenger, to recover damages for having been ejected from defendant's train, it appeared, on the trial, that plaintiff purchased, at Buffalo, a ticket good, by its terms, for a continuous passage from that city to Albany, and then for a like passage, from the latter place to New York; that, on his journey eastward, he left the

[1] Pohalski *v.* Ertheiler, 18 Misc., 33, 35.

train at Utica, where, on his leaving the sleeping-car, its conductor, as plaintiff testified, tore off the N. Y. Central coupon, and returned to him the stub and the H. R. R. coupon, though that conductor testified that he found the former coupon in plaintiff's berth, after the train had left Utica; that, next day, plaintiff took a train eastward, and, being unable to produce the Central coupon, was ejected at St. Johnsville, afterwards, however, paying the fare to Albany, under protest, and, returning to the train, before leaving St. Johnsville, proceeded to Albany; that there plaintiff met the conductor of the sleeping-car, who stated that he had found the Central coupon, whereupon the conductor of the Utica train refunded the fare from Utica to Albany, after doing which, he addressed plaintiff in slanderous language. These remarks of the conductor were given in evidence by plaintiff, *without objection* from defendant; but defendant's counsel subsequently requested the court to charge the jury that (if they believed plaintiff's testimony in regard thereto) the company was not liable therefor. This request was refused. On defendant's appeal, the Court of Appeals sustained defendant's exception to this refusal, saying:

"The fact that the statement referred to in the request was made without objection by the defendant did not render the refusal proper. It is said with plausibility by MULLEN, J.," (below) "that the evidence 'was conceded by both parties

to be competent, as evidenced by the one by offering, by the other by not objecting to it. To instruct a jury that such evidence is not to be taken into consideration is to exclude it from the case. This the court had no right to do.' The remark is specious and unsound. It does not follow that the omission to object to testimony is a concession that it is competent. Counsel may deem certain evidence offered entirely irrelevant and immaterial, *and therefore harmless*, and for that reason raise no objection to its introduction, and thus avoid an exception, assuming, as the learned judge, after making the remark above quoted, immediately added, that 'being in, it was the duty of the court and jury to give it whatever effect it ought to have in the case.' On the application of that principle, to the evidence referred to, the learned judge was asked to instruct the jury that it ought to have no effect whatever. This it was his duty to do, if the testimony was irrelevant, and such as could legally have no influence whatever on their verdict." The Opinion then refutes the proposition that the evidence was competent as part of the *res gestæ;* the remarks made by the conductor, at Albany, having been made several hours after the ejection at St. Johnsville, and being said not to be within the scope of the conductor's authority.[1]

Remark.—This decision holds clearly that, in a jury cause, where evidence manifestly *irrelevant*,

[1] Hamilton *v.* N. Y. C. R. R. Co., 51 N. Y., 100, 106; Sept., 1872.

i. e., such as "ought to have no effect whatever" on the case, is offered, the opposing party can safely sit silent, and afterwards move, as a matter of right, for a direction to the jury to disregard it.

The Hamilton case has been cited, followed and, apparently, extended beyond its original scope, in later decisions.

Hamilton Case followed.

In an action brought by a passenger to recover for injuries suffered by reason of the sudden starting of an omnibus, operated by defendants, *while she was alighting therefrom*, plaintiff, being asked, on her direct examination, to state if she recollected whether the driver made any remark to her at the time when she entered the vehicle, responded, without any objection by defendants, not only that she did so recollect, but that he swore at her, for not hurrying, and started before she had fully entered, causing her to fall to the floor. Afterwards, plaintiff's counsel, evidently apprehending that the anticipated verdict might be imperilled by this (irrelevant) testimony, moved to strike it out, and for an instruction, to the jury, to disregard it; which motion was granted, against defendants' objection and exception. On defendants' appeal from a judgment in plaintiff's favor, the General Term of the N. Y. Superior Court affirmed the judgment, refusing to sustain defendants' exception, and saying:

"Defendants' counsel not only permitted this irrelevant matter to be given in evidence, when it would have been quite easy to stop the witness in her narration of it, but to remain in the case. It was, therefore, fully competent for the court, at a later stage, on motion of plaintiff's counsel, and against the objection and exception of defendants' counsel, who claimed that the moral effect of the testimony could not be removed in that way, to strike out the said testimony, and to instruct the jury to disregard it. Indeed, the instruction to disregard it was the only relief to which the *defendants* would have been entitled, had *they* seen fit to make the motion"; citing Gawtry *v.* Doane, *supra,* and Hamilton *v.* N. Y. C. R. R. Co., *supra.*[1]

Remark.—This case is singular, in the circumstance that defendants tried to secure a reversal of the action of the trial court in granting *plaintiff's motion* to strike out, and direct a disregard of, irrelevant evidence introduced by plaintiff. The decision is cited here, as recognizing the authority of the Hamilton case.

Id.

In an action brought to recover the amount of two policies of insurance issued by defendant on the life of plaintiff's husband, evidence was given by plaintiff, without objection, of declarations made by defendant's general agent, tending to show the existence of an agreement whereby de-

[1] Roberts *v.* Johnson, 37 N. Y. Superior, 157, 160; Feb., 1874.

fendant waived a lapse of the policies caused by failure to pay premiums. After all the evidence was taken, defendant moved for a non-suit on the ground, among others, that it was not proved that the conditions of the policy, as to payment of premiums, had been waived; which motion was denied. On defendant's appeal, the General Term said:

"Those declarations were not competent evidence of the existence of an agreement, made six weeks before the time when they were made, against the defendant, the principal of the agent making them. And the omission to object to them when they were offered did not deprive the defendant of the right to insist upon their incompetency at the close of the evidence, or any other time during the progress of the trial. This was substantially held in the case of Hamilton *v.* N. Y. C. R. R. Co., 51 N. Y., 100. But the objection actually taken did not present this point for the decision of the court. It simply presented the objection that the agent was not authorized to waive or extend the time of payment of the premium. Whether the proof, given to show that an agreement had been made, for the extension, was competent proof for that purpose, was not mentioned nor suggested." [1]

Remark.—This Opinion contains an *obiter dictum;* recognizing the doctrine of the Hamilton case—the possibility of avoiding the effect of evidence,

[1] Dean *v.* Ætna Life Ins. Co., 2 Hun, 358, 368.

after omitting to object to its introduction—extending it from *irrelevant* evidence, to any which is "in its essential nature incompetent." Irrelevant evidence is, it is submitted, a class of evidence, in its essential nature incompetent (inadmissible).

Id.

In a special proceeding instituted to procure the revocation of probate of a will, a witness for contestant testified to declarations of decedent tending to impeach the will. The Surrogate refused to revoke probate, saying, in his Opinion:

"Very little of the testimony given by this witness was competent. The court would have been bound, under the rules of evidence, to exclude the bulk of it, if objection had been made, as it ought to have been made, to its admission. For in view of the fact that the mental capacity of the decedent, though technically put in issue by the pleadings, was not practically questioned at the trial, and that, aside from her declarations, there was really no proof of the fact of undue influence, those declarations, tending to impeach the integrity of her will, and to ascribe its contents to the improper interference of her children, were not admissible in evidence for any purpose. They were proved, however, without objection, and will accordingly be considered by the court, although they might, perhaps, be safely disregarded in view of the decision in Hamilton *v.* N. Y. C. R. R. Co., 51 N. Y., 106." [1]

[1] Shaw *v.* Shaw, 1 Dem., 21, 24; June, 1882.

Remark.—This case contains a guarded *dictum*, to the effect that the Hamilton case may be extended to a case of evidence essentially incompetent, though not distinctly irrelevant.

In an action brought to recover damages for injuries sustained by plaintiff, through the fall of an elevator, by reason of the breaking of a chain, in a building owned by defendants, on an allegation of their negligence, in which the court directed a verdict for defendants, plaintiff proved, without objection, that B., the head-engineer, who had charge of all the machinery and elevators in the building, addressing D., who was manager of the building, but had nothing to do with the construction or management of the elevator, had said: "Now, D., I knew that chain from the first day was not strong enough for the car;" also that B. had said: "that is the chain I had been repeatedly at Mr. D., about being too light for its work." On plaintiff's appeal, the General Term of the N. Y. Superior Court reversed the judgment rendered in favor of the defendants, on the ground that plaintiff was entitled to go to the jury on certain questions mentioned. But one of the prevailing Opinions contains the following expressions:

"Although this testimony was received without objection, yet I am of the opinion that it was not evidence of the fact that B. had given the defendants or their superintendent notice of the fact that

the chain was too light for its work. Neither was it admissible as part of the *res gestæ*. And the omission to object to this testimony was not a concession that it was competent. Hamilton *v.* N. Y. C. R. R. Co., 51 N. Y., 100. . . . Notice to D. was not notice to defendants." [1]

Remark.—Follows, in an *obiter dictum*, the Hamilton case.

Id.

In an action brought to recover a balance alleged to be due upon a competitive contract, for goods to be sold and delivered, in which the defense was that the contract was awarded to plaintiff, not the lowest bidder, by collusion between him and officers of defendant, after defendant had given evidence sufficient to justify a verdict in its favor, plaintiff put in evidence, without objection, a certificate of audit made by the clerk of the board of apportionment, and an award signed by two members of the board, though the law allowed an award to be made only by the concurrent vote of all the members of the board. The trial court charged the jury to give no weight or importance to the award or audit; to which charge plaintiff excepted. On plaintiff's appeal from a judgment rendered in favor of defendant, the General Term of the Supreme Court sustained the charge, holding that the award was illegal, and the certifi-

[1] Delaney *v.* Hilton, 50 N. Y. Superior, 341, 344; June, 1883.

cate "was not evidence in the case," and, further, saying:

"The court was right in the charge which was given to the jury, directing them to give no weight or importance to the award or audit, which were read in evidence. For where *improper* evidence is received during the progress of a trial, even without objection as this was, it is still the duty of the court, in the submission of the case to the jury, to direct them to disregard it. Hamilton *v.* N. Y. C. R. R. Co., 51 N. Y., 100." [1]

Remark.—This decision extends the benefit of the Hamilton-case doctrine to evidence, which was not objectionable on the specific ground of irrelevancy, and to a party who sought no relief from its effect.

Hamilton Case elucidated.

In an action brought by a passenger against a carrier, a street railroad company, to recover damages for personal injuries resulting from defendant's negligence in starting its car before plaintiff had reached a seat, thereby, as alleged, permanently maiming her, the Complaint set forth that the defendant "wrongfully and negligently started said car;" and the evidence, on the part of plaintiff, which was admitted *without objection*, was sufficient to warrant the jury in finding that, while plaintiff was in the act of gaining a place of safety in the car, the latter

[1] Neilson *v.* Mayor, etc., of N. Y., 1 Silv., Supreme Ct., 471, 484.

was "suddenly started with a violent jerk." Defendant requested the court to charge the jury, that "so far as the consideration of negligence . . . . is concerned, the question of the violent jerk is of no importance." This request was refused; and, on defendant's appeal, the refusal was sustained, the court saying:

"The theory of the defendant is, that this constituted error because the Complaint did not allege, in words, that the defendant started its car with a violent jerk. . . . The pleadings fairly apprised the defendant of the nature of the plaintiff's claim for damages; . . . . and evidence that the car was started with a jerk, while yet the plaintiff was in a position where she was exposed to the danger of being thrown down was material to the issue. The rule is supported by authority, that a party who has sat by, during the reception of incompetent evidence without properly objecting thereto, and has thus taken his chance of advantage to be derived therefrom, has not, when he finds such evidence prejudicial, a legal right to require the same to be stricken out (Matter of Morgan, 104 N. Y., 74, 86); nor has he a right to be relieved from its effect where such evidence is material (2 Rums. Prac., 2d ed., 351, 352, citing Quin *v.* Lloyd, 41 N. Y., 349). The defendant made no effort to exclude any of the evidence as to the violent jerk of the car; on cross-examination, the evidence was rather emphasized in response to de-

fendant's questions, and we are clearly of opinion that the court did not err in refusing to charge defendant's request. Of course, where the evidence admitted is *irrelevant*, the party calling attention to it is entitled to an instruction that it should be disregarded by the jury (Hamilton *v.* N. Y. C. R. R. Co., 51 N. Y., 100, 107). But the rule is different where the evidence is material to the issue, though it might be incompetent if objected to, as we have already pointed out." [1]

Remark.—This very recent decision contains a most valuable exposition of the Hamilton case, and shows how far, and in what manner, the latter is to be reconciled with the general duty to object to objectionable evidence when it is offered. It is supposed that the true rule, at least in the State of New York, as indicated by this Opinion, is as follows: In general, the only available time to *start* opposition to evidence is when it is offered; there is an exception as to evidence *purely irrelevant* (*i. e.*, immaterial), and not otherwise without the pale. As to such evidence, which, by definition, ought to have no effect whatever on the case, it appears that, on a jury trial, counsel can safely, if he choose so to do, insist on maintaining a strict logical position, *i. e.*, allow it to be introduced without opposition, and afterwards secure, as matter of right, an instruction, to the jury, to give it its logical effect—no effect whatever; though why he should omit to

[1] Plum *v.* Met. St. R. Co., 91 App. Div., 420, 422.

exercise the power to object to irrelevancy at the outset, may not be considered plain. The tendency, exhibited by some of the cases, to extend this doctrine to *improper* evidence, generally, is believed not to be warranted by the Hamilton precedent, and to be unintelligible, as tending to subvert the entire body of practice rules, relative to taking objections to the introduction of evidence. The result of the foregoing examination, therefore, is as follows:

CONCLUSIONS:

In non-jury causes:

The only possible method of seeking to avoid the effect of evidence, once admitted, is a motion to strike out. The granting or denial of such a motion being in the discretion of the trial court, the safer, as, evidently, also, the fairer, course is to object to the admission.

In jury causes:

It is difficult rationally to distinguish the plight of evidence, which the jury are instructed to disregard, from that of evidence which is stricken out. One feels an almost irresistible impulse to accord assent to the assertion of MULLEN, J. (quoted in 51 N. Y., 106), that "to instruct a jury, that" (such) "evidence is not to be taken into consideration, is to exclude it from the case."

But the line of demarcation between a motion to strike out, and one for an instruction to disre-

gard, is finally established; and all that can be said is, that the distinction exhibits one of those profound depths of the law, at which the lay-mind gazes with surprise, or aghast, while the professional succumbs to the fiat of authority. No argument, in favor of making both motions, in any one case, is apparent. It is submitted, as the true rule, that a legal right to the granting of a motion for instructions, to a jury, to disregard evidence which has been admitted without objection, exists only in the case of *irrelevant,* which is the same as *immaterial,* evidence.

SECTION IV.

MOTIONS TO DIRECT, AND TO SET ASIDE, VERDICTS.

In Linkhauf *v.* Lombard,[1] it was said:

"The rule should be regarded as settled, under all the authorities, as well by the decisions of the Courts of this State as by those of England, that, where there is no evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side, that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct a verdict, as the case may require."

The decision in this case reversed a judgment for plaintiff entered on a verdict, for error of the trial court in refusing to dismiss the complaint, or, subsequently, to direct a verdict for the defendants.

In Hemmens *v.* Nelson,[2] it was said:

"The most that can possibly be said is, that there was a *scintilla* of evidence on the question of malice which, under the doctrine of some older cases, was sufficient to carry the question to the

[1] 137 N. Y., 417, 426; 1893. [2] 138 N. Y., 517, 529; 1893.

jury. But this court is now firmly committed to the more modern and reasonable rule, that, where there is no evidence upon an issue before the jury or the weight of evidence is so decidedly preponderating in favor of one side, that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct a verdict, as the case may require."

The decision in this case affirmed a judgment for defendant entered upon a verdict directed by the court.

In Cohn *v.* Mayer Brewing Co.,[1] it was said:

"Where the weight of evidence is so decidedly preponderating in favor of one party that a verdict contrary to that preponderance would be set aside on motion, a trial judge should nonsuit, or direct a verdict, as the case may require."

The decision in this case affirmed a judgment entered upon a dismissal of the complaint by direction of the trial court, the Opinion citing the Linkhauf and Hemmens decisions (*supra*), and others.

In McDonald *v.* Met. St. R'y Co.,[2] it was said:

"It is undoubtedly true that, where there is a conflict of evidence, the court may properly submit the case to the jury if it sees fit, even though the testimony may decidedly preponderate on one

[1] 38 App. Div., 5, 6; 1899.

[2] 46 App. Div., 143, 146, 147; 1899.

side or the other, so that a verdict would be set aside as against the weight of the evidence, but it is equally true that the court will not be *required* to take such action although it is advisable to send the case to the jury, except where there is a *great* preponderance of testimony. But if the court does not see fit to take that course, and has itself disposed of the case, the question then to be determined is, whether, upon the evidence, a verdict in favor of the person against whom the judgment has been rendered could be sustained. If not, the action of the court will be approved. This has been the undoubted rule in this State for many years. . . . . It is said, in the case of Linkhauf *v.* Lombard, that the rule was to be regarded as settled, as well by the decisions of the courts of this State as by the courts of England, that, where there is *no* evidence upon any issue before the jury, or the weight of evidence is so preponderating in favor of one side that a verdict contrary to it would be set aside, it is the duty of the trial justice to direct a nonsuit. What was said in that case was accepted in a subsequent decision of the court,[1] where the Opinion was delivered by the only justice who dissented in the case of Linkhauf *v.* Lombard. In the absence of some decision of that Court, we do not think we should be at liberty to depart from the rule there laid down."

The decision in this case affirmed a judgment

[1] Hemmens *v.* Nelson.

for defendant entered upon a verdict rendered by direction of the trial court.

In Fealey *v.* Bull,[1] the appeal was from a judgment affirming one in favor of plaintiff, entered on a verdict rendered on the third trial of the action. The Court of Appeals affirmed the judgment appealed from, the point of the decision, as stated in the head-note, being that, where the Appellate Division has reversed a judgment based upon a verdict *held* to be against the weight of evidence, and grants a new trial, and, on a subsequent trial, the evidence is substantially the same, the refusal of the trial court, to non-suit, presents no error reviewable by the highest Court, where the evidence is sufficient to support a verdict either way. In its Opinion, the Court referred to the decisions of the Appellate Division in the Cohn and McDonald cases (*supra*), and explained the Linkhauf and Hemmens cases (*supra*), as follows:

"In Linkhauf *v.* Lombard, it is said that 'the rule should be regarded as settled, under all the authorities, as well by the decisions of the courts of this State as by those of England, that, where there is *no* evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side, that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct a verdict, as the case

[1] 163 N. Y., 397; 1900.

may require.' A statement substantially similar is to be found in Hemmens *v.* Nelson. Taken by themselves, these declarations apparently afford some justification for the rule asserted in the cases cited from the Appellate Division. But to excerpt a single sentence from a judicial opinion and construe and interpret it apart from the context of the Opinion in which it is found, and without regard to the subject-matter under discussion, is not only unreasonable, but at times leads to erroneous conclusions." And the Opinion then proceeds to confine the effect of the Linkhauf and Hemmens decisions to the facts presented to the court, in those cases, respectively, and concludes that, "where the right to a verdict depends on the credibility to be accorded witnesses, and the testimony is not incredible nor insufficient as a matter of law, the question of fact is for the jury to determine."

The McDonald case (*supra*) reached the highest Court in 1901, and its Opinion therein is next referred to.

In McDonald *v.* Met. St. R'y Co.,[1] the appeal from the judgment of the Appellate Division (*supra*) was allowed "upon the ground of an existing conflict in the decisions of different departments of the Appellate Division, as to when a verdict may be directed where there is an issue of fact, and because in this case an erroneous principle

[1] 167 N. Y., 66 (1901).

was asserted, which, if allowed to pass uncorrected, would be likely to introduce confusion into the body of the law (p. 68)." The Court reversed the judgment below, holding that the trial court erred in directing a verdict, and *finally settled* the distinction between the power of a trial court to direct, and to set aside, a verdict, saying:

"The rule that a verdict may be directed whenever the proof is such that a decision to the contrary might be set aside as against the weight of evidence would be both uncertain and delusive. There is no standard by which to determine when a verdict may be thus set aside. It depends upon the discretion of the court. The result of setting aside a verdict, and the result of directing one, are widely different, and should not be controlled by the same conditions or circumstances. In one case there is a re-trial. In the other the judgment is final. One rests in discretion; the other upon legal right. One involves a mere matter of remedy or procedure. The other determines substantive and substantial rights. Such a rule would have no just principle upon which to rest. . . . So long as a question of fact exists, it is for the jury and not for the court. If the evidence is insufficient, or if that which has been introduced is conclusively answered, so that, as a matter of law, no question of credibility or issue of fact remains, then the question being one of law, it is the duty of the Court to determine it."

The Opinion cites the decision of the Fealey case (*supra*), as disclosing that the reversal in the Linkhauf case was upon the ground that the proof amounted at most to a mere surmise, and that, in the Hemmens case, the principle, that, if there is any evidence upon a question of fact, it should be submitted to the jury, was asserted.

Therefore, since 1901, it has been, and presumably will continue to be, true that a trial judge should not nonsuit, or direct a verdict, on the ground that the weight of evidence is so decidedly preponderating in favor of one party that a verdict contrary to that preponderance would be set aside on motion; and that his power and duty, to give such a direction are confined to cases where "no question of fact exists."

But, as stated in the Fealey Opinion, the hypothesis "that there is *no* evidence to go to a jury" does "not mean literally none, but that there is none that ought reasonably to satisfy a jury, that the fact sought to be proved is established." The doctrine of a "*scintilla* of evidence" is adverted to. A mere *scintilla* is not, now, sufficient to carry a case to the jury, and the judge, not the jury, is to say that the evidence has only the dimensions and vitality of a spark. That doctrine is explained as covering two classes of cases: one, where "the proof has been a mere matter of inference"; and the other, cases of direct evidence, such as where the testimony of a witness is "in such contradiction of matters of

common knowledge, or the laws of nature, as to be incredible as a matter of law."[1]

Meanwhile, the former rule continues, it appears, to prevail in the Federal Courts. In a recent case, in the Eighth Circuit, it was *held*, that a passenger in a street car, who, on account of sudden illness, put her head through a window above a screen covering the lower half of the aperture, and was struck by a trolley pole, she being obliged to stand up, or kneel, on the seat, in order to assume the position mentioned, was guilty of contributory negligence, as matter of law.

The Court said: "While the questions of negligence and contributory negligence are ordinarily questions of fact, to be passed upon by a jury, yet if it clearly appears from the undisputed facts, judged in the light of that common knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, *or where the evidence is of such conclusive character that the court would be compelled to set aside a verdict returned in opposition to it*,[2] it may withdraw the case from the consideration of a jury. In North Penn. R. R. *v.* Commercial Bank,[3] the Supreme Court said: 'It would be an idle proceeding to submit the evidence to the jury when

[1] 163 N. Y., p. 402.

[2] The italics are not in the original.

[3] 123 U. S., 727; 8 Sup. Ct. R., 226; 31 L. Ed., 287.

they could justly find only in one way.' While the plaintiff's sudden illness placed her in a very uncomfortable and distressing position, yet that fact would not authorize her to disregard unmistakable warnings of danger. She must have known that the heavy screens which barred the windows were placed there for no other purpose than to prevent passengers from extending their arms or heads out of the windows, as the meshes in the screen were too large to serve any other purpose. To disregard this plain warning was, we think, such contributory negligence upon her part as will necessarily preclude a recovery in this case."[1]

CONCLUSION:

In conclusion: the practical rule is at length definitely settled, in New York, that it is not within the province of the court to *prevent* a verdict because of the court's apprehension of the preponderance of evidence, though it may *set aside* a verdict, and grant a new jury trial, upon considerations in that regard. But a reconciliation of the doctrine, that it is for the court to determine that, though there *is* evidence, to go to the jury, there is none that ought reasonably to sat-

[1] Christensen *v.* Met. St. R'y, 137 Fed. Rep., 708; U. S. C. C. A., April, 1905: citing R. R. Co. *v.* Husen, 95 U. S., 465; Schofield *v.* Chicago, M. & St. P. R. R., 114 U. S., 615; Nor. Pac. R'y *v.* Freeman, 174 U. S., 379; N. W. R. R. *v.* Davis, 53 Fed. Rep., 61; Mo. Pac. R'y *v.* Moseley, 57 Fed. Rep., 921.

isfy that body that the fact sought to be proved is established, instead of giving them a chance of a vote, with the unqualified insistence on a preservation of the sacred right of trial by jury inviolate forever—is a problem that will remain inscrutable as long as the dictum de omni and the present constitution of the human mind shall survive.

THE END.

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